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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-883

NEWMAN SIGNS, INC.,
a North Dakota corporation,

Appellant/Petitioner,

v.

WALTER R. HJELLE, as North Dakota State Highway Commissioner, and the NORTH DAKOTA HIGHWAY CORRIDOR BOARD,

Appellees/Respondents.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of North Dakota entered July 3, 1978 upholding the constitutionality of state law (North Dakota Century Code, Chapter 24-17 and administrative rules, regulations and actions) prohibiting and controlling outdoor advertising. Petition for Rehearing was denied and entered August 3, 1978.

OPINIONS BELOW

The opinion of the North Dakota Supreme Court dated and entered July 3, 1978 is reported at 268 N.W.2d 741, and is set forth in Appendix A hereto. The findings of fact, conclusi ns of law, order for judgment and judgment of the North Dakota District Court, First Judicial District, is unreported and is set forth in Appendix B hereto. The memorandum opinion of the Hon. Ralph B. Maxwell, Judge of the North Dakota District Court, First Judicial District, is unreported and is set forth in Appendix C hereto.

JURISDICTION

Two actions brought by appellant, Newman Signs, Inc. (Newman), and one action brought by Walter R. Hjelle as North Dakota State Highway Commissioner (Commissioner), all in North Dakota District Court, were consolidated for trial because all involved the same parties and similar subject matter. The actions were commenced in 1973 and 1974 and trial was had before the District Court without a jury in August, 1976.

The Commissioner sought the enforcement of N.D.C.C. 24-17 and certain rules, regulations and actions of the Commissioner and of the North Dakota Highway Corridor Board (Board) all regulating outdoor advertising. Removal of signs and prohibition of erection of signs were the purposes of that litigation. Appellant, on the other hand, sought just compensation for the taking of its property and raised constitutional questions about the validity of the law, including the

administrative determinations. Appellant contended the law violated the Fourteenth Amendment by depriving of liberties and property without due process of law and by denying equal protection of the law. Appellant argued that it had the right to engage in a lawful business, that freedom of speech was unconstitutionally infringed upon, that the law was vague and overbroad, that procedural due process was not afforded by N.D.C.C. 24-17-11, and that its property was being taken for a public purpose without payment of just compensation.

On December 10, 1976 judgment was entered in North Dakota District Court, First Judicial District, holding the Commissioner's rules unlawful and part of the administrative actions unconstitutional, and holding the balance of the law constitutional as construed. The Commissioner and the Board appealed to the Supreme Court of North Dakota and Appellant Newman cross-appealed raising the constitutional questions. The Supreme Court of North Dakota, on July 3, 1978, held the state law constitutional rejecting all of appellant's constitutional arguments. Petition for Rehearing was denied August 3, 1978. A Notice of Appeal was filed October 2, 1978. By order dated October 24, 1978 Mr. Justice Blackmun extended the time for docketing this appeal and for filing a petition for writ of certiorari herein through December 1, 1978. This court has jurisdiction by virtue of 28 U.S.C. Section 1257(2). The following cases sustain the jurisdiction of this court: *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); *In re Griffins*, 413 U.S. 717 (1973); *Dandridge v. Williams,* 397 U.S. 471 (1970) reh. den. 398 U.S. 914; *Bantam Books v. Sullivan,* 372

U.S. 58 (1963); *Panhandle Eastern Pipe Line Co. v. Highway Commission*, 294 U.S. 613 (1935); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are set forth in full in the appendix and are as follows:

United States Constitution,
Amendment One

United States Constitution,
Amendment Fourteen, Section 1

Title 23 United States Code, Section 131,
Public Law No. 89-285

North Dakota Century Code, Chapter 24-17

Especially pertinent sections of the North Dakota law are:

N.D.C.C. Sec. 24-17-02. Definitions.–

1. . .

2. "Outdoor advertising" means a sign, display or device of any kind or character including statuary, erected or maintained for outdoor advertising purposes, upon which any poster, bill, printing, painting or other advertisement of any kind whatsoever may be placed for advertising purposes and shall include but not be limited to any card, cloth, paper, metal, painted or wooden sign of any character placed for outdoor advertising purposes, on or affixed to

the ground or any tree, wall, bush, rock, fence, building, structure or thing, either privately or publicly owned. The terms "sign, display, or device" comprehend all forms of outdoor advertising and the use of one such term in this chapter includes all forms of outdoor advertising.

3. . .

4. . .

5. . .

6. . .

N.D.C.C. 24-17-03. Limitations of outdoor advertising within six hundred sixty feet [201.17 meters].–Subject to the provisions of this chapter, no sign shall, after January 1, 1968, or any later date established by the Congress of the United States in relation to Title 23, United States Code, Section 131, or waiver thereof pursuant to said Title 23, be erected or maintained within six hundred and sixty feet [201.17 meters] from the nearest edge of the right of way and visible from the main traveled way of any highway which is a part of the state highway system in this state except the following:

1. . .

2. Signs advertising the sale or lease of property upon which they are located.

3. Signs specifically advertising activities conducted, services rendered, goods sold, stored, produced or mined, or the name of the enterprise on the property and which are within fifty feet [15.24 meters] of the area used for the purpose advertised and upon which they are located.

4. Signs in areas which are now or hereafter zoned industrial, commercial, or the like by the board as provided in this chapter.

5. Signs in unzoned commercial or industrial areas, which now or hereafter qualify as such, pursuant to the agreement between the board and the secretary of transportation according to Title 23, United States Code, Section 131.

6. . .

7. . .

8. . .

N.D.C.C. 24-17-03.1. Limitations of outdoor advertising beyond six hundred sixty feet [201.17 meters].–Subject to the provisions of this chapter, no sign shall, after July 1, 1977, be erected or maintained beyond six hundred sixty feet [201.17 meters] from the nearest edge of the right of way, located outside of urban areas, visible from the main traveled way of the highway system, and erected with the purpose of their message being read from such main traveled way except the following:

1. . .

2. Signs, displays, and devices advertising the sale or lease of property upon which they are located.

3. Signs, displays, and devices advertising activities conducted on the property on which they are located.

N.D.C.C. 24-17-11. Unlawful advertising.–Any advertising sign which violates the provisions of this chapter or the regulations adopted by the board is hereby declared to be illegal. The commissioner shall give thirty days' notice, by certified mail, to the owner thereof to remove the same if it is a prohibited sign, or cause it to conform to regulations promulgated by the board if it is an authorized sign. If the owner fails to act within thirty days as required in the notice, or if

the commissioner is unable to ascertain the ownership of the sign, then such sign shall be deemed abandoned and the commissioner may remove such sign, and to this end he may enter upon private property for the purpose of removing such sign without liability for his actions.

North Dakota Highway Commissioner's Rules and Regulations

North Dakota Highway Commissioner's Interim Policy

North Dakota Highway Corridor Board Interim Policy,
North Dakota Administrative Code, Title 36

North Dakota Highway Corridor Board Rules and Regulations

QUESTIONS PRESENTED[1]

I. Whether the state law prohibiting and regulating signs violates First Amendment rights of freedom of speech, including the right of the public to be informed, as guaranteed through the due process clause of the Fourteenth Amendment.

II. Whether the decision is in conflict with *Landmark Communication, Inc. v. Virginia,* ____ U.S. ____, 56 L.Ed.2d 1 (1978) in that it gives deference to legislative findings and limits judicial inquiry where First Amendment rights are at stake.

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[1] To the extent that the questions presented are more properly raised by a petition for certiorari, appellant requests that these papers be so treated. 28 U.S.C. Sec. 2103.

III. Whether the decision is in conflict with *In re Primus*, ____ U.S. ____, 56 L.Ed.2d 417 (1978) in that it fails to apply the exacting scrutiny applicable to limitations on First Amendment rights of freedom of speec'

IV. Whether the decision is in conflict with *Grayned v. City of Rockford*, 408 U.S. 104 (1972) in that the state law is too vague in violation of the principles set forth therein.

V. Whether a state may summarily, by administrative determination, determine a person's sign to be illegal and provide that if after thirty days' notice to the owner of the sign it has not been removed, the sign is deemed abandoned and subject to removal by the state without liability on its part, all without hearing or notice of opportunity for hearing.

VI. Whether the decision is in conflict with *Memphis Light, Gas and Water Div. v. Craft*, ____ U.S. ____, 56 L.Ed.2d 30 (1978) in that the state law, and particularly Section 24-17-11 N.D.C.C., is not reasonably calculated to inform of an opportunity to present objections or to allow opportunity for hearing prior to deprivation of property interests.

VII. Whether the state law's discrimination against the class of signs prohibited violates the equal protection clause of the Fourteenth Amendment.

VIII. Whether the decision is in conflict with *Grayned v. City of Rockford*, 408 U.S. 104 (1972) in that the state law is too overbroad in violation of the principles set forth herein.

IX. Whether the state law as construed unconstitutionally denies appellant the right to be engaged in a lawful business involving First Amendment rights in

violation of the due process clause of the Fourteenth Amendment.

X. Whether the decision is in conflict with *W.W. Cargill Co. v. Minnesota*, 180 U.S. 452 (1901) in that it imposes upon appellant the obligation to comply with regulations repugnant to constitutional rights.

XI. Whether the state law as construed and applied to appellant constitutes the taking of private property for public use without the payment of just compensation in violation of the due process clause of the Fourteenth Amendment.

XII. Whether the state law as construed and applied to the appellant is repugnant to subsections (g) and (n) of 23 U.S.C. 131 and Section 401 of Pub. L. No. 89-285.

STATEMENT OF THE CASE

The history of this case spans several years. On October 22, 1965, Title 23, United States Code, Section 131, Pub. L. No. 89-245, known as The Federal Highway Beautification Act of 1965 became law. App.E.2.9. Subsection (b) provided for a penalty reduction of 10% of the amount of highway trust funds apportioned to any state which did not, on or before January 1, 1968, provide for effective control of outdoor advertising signs within 660 feet of the nearest edge of the right-of-way and visible from the main-travelled way of the Interstate and primary highway systems. The penalty was to be invoked until such time as the State provided for effective control (Ex. 1A, R. 441, R. 80)[2], but the Secretary of Commerce

[2] References to the record below are: R. = Transcript, Ex. = Exhibit. App. = Appendix.

could suspend its application to a State. (Ex. 1A, R. 441, R. 80). The protection of just compensation was given major consideration in the law as originally enacted and subsequently amended. (See subsections g and n and section 401).

On November 18, 1965 the North Dakota State Highway Commissioner, Walter R. Hjelle, (Commissioner), took almost immediate action to attempt to regulate signs in North Dakota (R. 760, 761). He requested a North Dakota Attorney General's opinion in regard to the Act. (Ex. 5, R. 441, R. 842). On the same day the Attorney General responded citing the North Dakota assent statute, NDCC 24-04-01 (Ex. 6, R. 441, Ex. 3, R. 441) as authority for the commissioner to act. (Ex. 6, R. 441, Ex. 3, R. 441). Both the letters of November 18, 1965, refer to and recognize that legislative action was necessary. (See last paragraphs of Ex. 5, R. 441, and Ex. 6, R. 441, respectively). On December 12, 1965 the Commission also drafted a rule and regulation, App. E.3.a. (Ex. 7, R. 441) and obtained approval of it from the Attorney General (Ex. 8, R. 441). For some time prior to 1975 the appellant, Newman Signs, Inc., was in the business of outdoor advertising.

Initial reaction of appellant to the action of the Commissioner was one of despair and the thought that perhaps it would mean going out of business. (R. 209, 210, 700). The Commissioner gave his reason for such drastic action that it was needed to preserve the highway trust funds, that it was to avoid the penalty of the federal act (R. 767), but also because of the uncertainty surrounding the federal law. (R. 772, 773).

An inventory of signs was necessary to carry out the original provisions of the Federal Highway Beautification Act of 1965 (R. 81, 640) and one was conducted in North Dakota in early 1966. Later inventories of signs in North Dakota were conducted in 1972 and 1973. (R. 640). Also Congress recognized the substantial impact of the Act and provided for a comprehensive study of the Act as it affected the private sector because Congress was interested in possible alternative methods of accomplishing the same purposes. (R. 53, 54). The report was to be completed by January 10, 1967. (R. 53). Title 23 U.S.C., Section 302 (See Ex. LA, p. 690, p. 86) also provided that before "standards, criteria, and rules and regulations" were adopted that public hearings were to be held in every state. A hearing was held in North Dakota on March 1, 1966. (Ex. 10, R. 441).

The period from October 22, 1965 to January 1, 1968 was viewed as a formulative period. (R. 37). In addition to the necessity for North Dakota to take legislative action to obtain effective control of signs, an additional requirement for obtaining effective control in each state was the necessity of entering into an agreement with respect to size, lighting, spacing and defining unzoned commercial or industrial areas, which agreement was to be between the state and the Secretary of Commerce. (R. 36). The agreement was required by subsection (d) of the Act. (Ex. 1A, R. 441, R. 86). (The North Dakota agreement was not executed until January 19, 1972.) (Ex. 37, R. 441).

On April 5, 1966 the Commissioner prepared an "Interim Policy on Billboard Control". App. E.3.b. (R. 660). The policy provided for a permit system for the

erection of signs and required a waiver of just compensation for any later removal of the signs. (Ex. 12, R. 441). No new signs had been allowed between December 2, 1965 and April 5, 1966.

The Commissioner wanted legislation and his staff worked on proposed enabling legislation for North Dakota. (R. 790). It was felt there should be an emergency clause to give time to comply with the federal law by January 1, 1968. (R. 802, 803). The North Dakota law never would have been proposed by the Commissioner but for the penalty provisions of the federal law. (R. 829). The proposed law became law on February 28, 1967 as N.D.C.C. Chapter 24-17, the North Dakota Highway Beautification Act. App. E.2.b.

The first section of the North Dakota Act declares the policies of the Act stating the purpose is to regulate outdoor advertising "through zoning principles and standards consistent with the public policy relating to the areas adjacent to the state highway system pursuant to Title 23, United States Code, Section 131 . . . and rules and regulations promulgated thereunder." N.D.C.C. 24-17-01. It was anticipated that standards would be established in the agreement with the Secretary of Transportation by January 1, 1968. (R. 43, 23 U.S.C. 131(d)). In fact the agreement was not signed until February 19, 1972. (R. 774, Ex. 37, R. 441).

N.D.C.C. 24-17-06 created the Highway Corridor Board. The Board is an agency of the state composed of five members who represent various governmental and private interests affected by the Act. The law required a representative of the North Dakota Outdoor Advertising Association to be a member. The first such representative was Harold Newman, who is also

President of the appellant, and he served on the Board from its initial organization up to the time that the Board was joined as a defendant in this case. (R. 218, 522, 523, Ex. CB-2, R. 523).

On March 20, 1967 the Highway Corridor Board met and completed adoption of an interim policy, App. E.3.c. (Ex. CB-1, R. 162, Ex. 22, R. 441), with Harold Newman voting no. (Ex. 22, R. 441). The Application for an Outdoor Advertising Permit and Permit which was adopted by the Highway Corridor Board contained language almost identical to that which was found in the Commissioner's earlier form (Ex. 24, p. 441) including the waiver of compensation. Harold Newman also opposed adoption of any rules and regulations by the Board until an agreement was signed with the federal government and until such time as there was a comprehensive plan. (R. 357). N.D.C.C. 24-17-09(2) requires a comprehensive plan in accordance with which Board regulations shall be made. The only comprehensive plan of the Board, if any, is the Board's only rules and regulations which were adopted on August 1, 1973. App. E.3.d. (R. 831, 832, Ex. 46, R. 441). The notice of a public hearing on the Highway Corridor Board's proposed rules and regulations for placement of outdoor advertising was published December 8, 1967. (Ex. 28, R. 441). The hearing on proposed rules and regulations was held January 24, 1968.

In 1968 there was great concern at the federal and state levels about the imposition of the penalty and the standards to be required by the agreements with the states. (R. 61, 62, Ex. 26, R. 441, pp. 9 and 10). In early 1969 the Federal Highway Beautification Act and the North Dakota Highway Beautification Act were in a

state of flux. There was still substantial confusion about the intent and purpose of the acts as well as the method of carrying them out. In fact the confusion, uncertainty, frustration, and ambiguity continued to exist from 1967 to 1972. (R. 37, 57, 65, 773, 774, 775, 803, 826, 828). No federal regulations had been adopted although there were proposed regulations. (R. 87). No state regulations had been adopted. (R. 803). The North Dakota legislature had before it an amendment to N.D.C.C. Section 24-17-03 which provided for extension of the date upon which the limitations on outdoor advertising were to take effect if changed by Congress or if the date was waived. At the same time Congress had before it a bill, H.R. 2495, which would delay the effective date (January 1, 1968) of outdoor advertising control for four years to January 1, 1972. (See Ex. 30, R. 441, R. 264). The North Dakota law was amended. The federal was not. But Secretary of Transportation Volpe suspended the imposition of the penalty and the requirement of effective control until the agreement with North Dakota was required and signed on January 19, 1972. (23 U.S.C. 131(b), Ex. 30, R. 441, R. 61-66, 130-132).

Funding was always a key issue because state law tied removal of signs to federal funding. State and federal programs were stagnant until the passage of the Federal Aid Act in the Highway Act of 1970 when there was the first substantial funding og the Outdoor Advertising Control program since the passage of the original Act in 1965. (R. 45). Those funds were for fiscal 1971, and it was then that the new activity began. (R. 45-48). The Department of Transportation pressed for agreements.

(Ex. 33, R. 441, Ex. 36, R.441). However, until December 1972 there still were no federal regulations and there were no state rules and regulations properly promulgated until 1973. On December 12, 1972 the Department of Transportation issued a policy and procedure memorandum on acquisition of signs. (Ex. 42, R. 441). There were no regulations on control of signs until later, (R. 29, 30, 33, Ex. 44), which were issued as Policy and Procedure Memorandum 90-6. (R. 29, 30, Ex. 44, R. 441).

On August 1, 1973 the Highway Corridor Board met, reviewed the rules and regulations which had been previously published and on which a hearing had been held on January 24, 1968. The Board adopted the regulations with some amendments. App. E.3.d. (Ex. CB-1, p. 162. 8/1/73, Ex. 45, R.441).

The Highway Act of 1974 amended 23 U.S.C. 131(g) to provide, among other provisions, that "just compensation shall be paid upon the removal of any outdoor advertising sign, display or device lawfully erected under state law." (Ex. 1A, R. 441). The 1974 amendments to the Federal Act provide for compensation for signs lawfully erected in North Dakota during the "hiatus" which ended in North Dakota on January 19, 1972. (R. 45-48, 76, 97, 109, 121, 145).

From 1965 to the present appellant has continued in the outdoor advertising business. Appellant attempted to establish what rules and regulations were applicable during that period of time but could not. (R. 290). The Board was the policy making and rule making agency, and the Commissioner was the enforcing agency. (R. 795, 951). However, the Commissioner's staff followed the federal guidelines, proposed rules and regulations or federal rules and

regulations as they were communicated to the Commissioner even though they were not rules and regulations. (R. 271, 272, 285, 321, 322, 925). There are no rules or regulations of the Highway Commissioner regulating signs. (See North Dakota Administrative Code, Title 37).

The appellant owns many signs which were erected prior to December 3, 1965. A large number of those signs have been changed in some manner as required during the course of business. No permits were applied for to change signs because there was nothing in the interim policies or rules and regulations which ever required permits for modification of a sign. App. E. (cf. App. E.3.c., A.___, entitled "Addendum to the Interim Policy"). Appellant also applied for permits to erect new signs after April 5, 1966 and erected some signs without permits.

In June, 1973 the Highway Commissioner began sending notices to appellant demanding removal of some of appellant's signs pursuant to N.D.C.C. 24-17-11. Appellant commenced an action for payment of just compensation for the removal and taking of appellant's property. In 1974 appellant commenced another action against the Highway Commissioner in regard to other signs and at the same time the Commissioner brought an action against appellant. The three cases were consolidated, the North Dakota Highway Corridor Board was joined as a defendant and an amended complaint was filed by appellant.

This case involves the prohibition and control of outdoor advertising under, and interpretation of, the Federal Highway Beautification Act, App. E.2.a. (23 U.S.C. 131) and the North Dakota Highway Beautification Act, App. E.2.b. (N.D.C.C. 24-17). Appellant raised issues of the constitutionality of the North Dakota law asserting it violates the Fourteenth Amendment by unconstitutionally depriving of liberties and property guaranteed by the due process clause and by invidiously discriminating contrary to the equal protection clause. Appellant raised the federal questions in all stages of the trial and appellate proceedings. (e.g. see Second Amended Complaint, Plaintiff's Responding Trial Brief; Reply Brief of Appellee, and Petition for Rehearing). The trial court held the Commissioner's rules unlawful and the waiver of compensation unconstitutional and held the remainder of the law constitutional. Conclusions of Law, 4,5,6,10; Judgment, 4,5,6,10, App. C. The appellate court upheld the constitutionality of the law holding it does not permit the taking of private property for public use without payment of just compensation, or create an unconstitutional classification, or violate due process of law contrary to the Fourteenth Amendment, or violate First Amendment guarantees of freedom of speech. See 268 N.W.2d 741 at 755-762, App. A. 28a-44a.

Petition for Rehearing was denied on August 3, 1978 and on October 2, 1978 the appellant filed a Notice of Appeal to this Court.

THE QUESTIONS ARE SUBSTANTIAL

INTRODUCTION

This case brings before this court questions which are substantial and national in scope. The thread which ties together all of the issues is to what extent the

fundamental First Amendment liberty of freedom of speech ca. oe restricted. Appellant contends the court below failed to apply or did not properly apply the standards which this court has determined are applicable and that the decision of the Supreme Court of North Dakota is inconsistent with the precedents of this court.

This Court has never given plenary consideration to First Amendment questions involving outdoor advertising. In spite of the fact that the Court has recently cited the case of *Markham Adv. Co. v. Washington*, 73 Wash.2d 405, 439 P.2d 248 (1968), app. dismissed, 393 U.S. 316 (1969),[3] that case is readily distinguishable from this case because the Supreme Court of Washington in *Markham* concurred with the trial court that the evidence was sufficient to find a reasonable relationship between outdoor advertising and traffic safety. 439 P.2d 255, 258. There is no evidence in the instant case either at the trial level or as legislative history to support the legislative findings and purposes as determined by the court below. *Markham* also cited as authority for its judgment *Valentine v. Chrestensen*, 316 U.S. 52 (1942) holding at page 54 that the constitution does not impose restraint on the government with respect to purely commercial advertising. *Bigelow v. Virginia*, 421 U.S. 809 (1975) and subsequent decisions of this court on commercial speech have apparently superseded *Valentine*. *Markham*

[3]See *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 94 n.7 (1977); *Young v. American Mini Theatres, Inc.* 427 U.S. 50, 68 N.30 (1976) (Opinion of Stevens, J., concurred in by Burger, C.J. and White and Rehnquist, JJ.) reh. den. 429 U.S. 873.

is further distinguished from the case at hand because it is appellant's contention that this case is not a "commercial speech" case.

Appellant is also quite aware of the court's recent summary dispositions of *Suffolk Outdoor Adv. Co. v. Hulse*, 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263 (1977), app. dismissed 439 U.S. ___ (Oct. 2, 1978) and *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977), app. dismissed 439 U.S. ___ (Oct. 2, 1978). Both of those cases are distinguishable from this case. *Suffolk* involved the local issue of a city ordinance prohibiting off-premise billboards which were defined by the ordinance to be

> "A SIGN which directs attention to a business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such SIGN is displayed, or only incidentally sold, offered, or existing upon such lot." Town of Southampton Zoning Ordinance 1-30-20.68.

The North Dakota law sweeps within its purview all signs adjacent to the state highway system outside of municipalities with certain exceptions. N.D.C.C. 24-17-09(2)(b), N.D.C.C. 24-17-03. The law also defines outdoor advertising broadly. N.D.C.C. 24-17-02(2). App. 11e. The word "advertising" is not defined by the North Dakota law but it is clear from the entire Act that all signs are to be included and that the common meaning of "advertise" as public notice is the intended meaning of the word in the statute.[4]

Modjeska is also a case more local in nature involving a limited area, in that case, a park. The state of New

[4]Webster's New Collegiate Dictionary, 1975.

York, having limited the regulation to a park, has drafted a much narrower restriction than the state of North Dakota. And, in addition to the foregoing distinctions between *Suffolk* and *Modjeska* and the instant case, there are substantial issues raised herein which were not raised in those cases.

The complexity of this case, partially caused by the lengthy history of it, has created a number of substantial federal questions. Appellant is limited in the presentation of those issues in this jurisdictional statement. Of course they will be fully presented and argued in the brief. Generally, however, the questions present to this Court issues which are ripe for review, and necessarily arise out of the recent decisions of the Court.

As a part of the questions presented for review, appellant presents to the court the question of whether the signs which fall within the purview of the North Dakota law are more than pure commercial speech, and, if so, then the question of to what degree of protection they are afforded by the First Amendment. And, irrespective of the answer to those questions, every question connected with the regulation or prohibition of signs is permeated with the fundamental right of free speech. As such the state law must surrender to close inspection and strict scrutiny by the court. Once the threshold is crossed into the realm of the First Amendment it is appellant's contention that the decisions of this court require that deference no longer be given to the legislative finding, that judicial inquiry behind such finding must be made, and that the burden is upon the state to show it has constitutionally encroached upon the fundamental rights. The court

below did not put the North Dakota law to these tests even though the forum here involved is that of the public thoroughfare, namely the state highway system.

Almost every state now has state law similar to the prohibition provisions of the North Dakota law with respect to the limitation and regulation of signs and the types of signs which are allowed. These laws were enacted as a result of the Federal Highway Beautification Act of 1965 and the commencement of enforcement of the Act in late 1971.[5] The effect on signs in general and on the outdoor advertising industry is real and substantial. As of March 31, 1977, illegal and non-conforming signs on the Interstate and federal-aid primary highways already removed totaled 440,205 signs and the total number of signs left to be removed under these programs was estimated at that time to be 288,930 signs.[6] The appellant had approximately 1,750 signs when this case began of which approximately 950 signs, or 54%, are to be removed.

Outdoor advertising as a medium of communication and expression was one of the first to be employed in the United States.[7] Surveys show that 67% of persons

[5] By 1974 the last state had passed laws, and all states now have the basic legal framework for carrying out the program. Report to the Congress of the United States by the Comptroller General, Obstacles to Billboard Removal, CED - 78-38, March 27, 1978, p. 12 (South Dakota is now considering legislation).

[6] Obstacles to Billboard Removal, Id. at 29.

[7] Geller, Advertising at the Crossroads 57 (1952). The first recorded use of outdoor advertising in America was a 1642 signboard in New Amsterdam. Id. By 1865, the industry had grown to the extent that 275 bill-posting companies were employing between two and twenty persons each. Id. at 58.

polled felt that commercial billboards along the highways provided a service to motorists.[8] In a recent survey in Florida 85% of 400 respondents to a survey felt outdoor advertising was useful, and 70% agreed that billboards break the monotony of driving on the highways and help them stay awake.[9] Appellant's sign space is generally sold rather than donated, but appellant donates space for and initiates its own public service announcements. Signboards, as a means of communicating political, philosophical and social ideas, are familiar to every person, and appellant's signs often carry such messages. Ex. 58, R. 199.

The Supreme Court of North Dakota took up the constitutionality of the North Dakota law in the order of: taking, equal protection, due process and freedom of speech. App. 28a-44a. This jurisdictional statement will treat those issues in the order of: free speech, due process, equal protection, and taking.

Generally the questions presented herein pertains to the question of whether a state may prevent persons from locating signs on private property adjacent to an entire state highway system except in municipalities, commercial and industrial areas and except when the sign advertises the property, or activity conducted on the property, upon which the sign is located.

I.

THE STATE LAW PROHIBITING AND REGULATING SIGNS VIOLATES FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH, INCLUDING THE RIGHT OF THE PUBLIC TO BE INFORMED, AS GUARANTEED THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

[8] Obstacles to Billboard Removal, p. 13.

[9] Attitudes of the Florida Public Toward Outdoor Advertising, Watson, 1976, p. 10.

The first issue confronting the Court hereunder is whether the regulated speech in question is commercial. Not all of appellant's signs are commercial within the guidelines of the Court's decisions. In *Virginia Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976), fn. 24, p. 771, the definition of commercial speech is relegated to that which does "no more than propose a commercial transaction." Citing *Pittsburgh Press Co. v. Human Relations Comm'n.*, 413 U.S. 376, 385 (1973). Recently *In re Primus*, ____ U.S. ____, 56 L.Ed.2d 417, 438 (1978) and *Ohralik v. Ohio State Bar Ass'n.* ____ U.S. ____, 56 L.Ed. 444, 453 (1978) reaffirm that definition. Although most of appellant's signs fall within the definition of commercial speech, many do not. The scope of the North Dakota law is not limited to commercial signs. The lower court, however, limited its inquiry to the standards set out in *Va. Pharmacy Bd.*, supra, App. 40a-44a. Then it applied those standards superficially. The case is deserving of review according to the higher standards required by this Court. The political sign, the public service sign, the social commentary sign all merit the review that the armband,[10] leaflet,[11] or picket[12] have commanded.

Contrary to the opinion of the lower court, the law does not pass the tests set out in *Va. Pharmacy Bd.*, supra. Although the North Dakota court recognized that it must give "close inspection" because free speech is regulated, it does not appear it used the test. The court in *Va. Pharmacy Bd.*, 425 U.S. at 771, stated openly that it

[10] *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969).

[11] *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Talley v. California*, 362 U.S. 60 (1960).

[12] *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

was not necessary to explore the bounds of the threefold test it applied here. The North Dakota court apparently looked no further. It ignores the content regulation.

The North Dakota law does regulate content because it differentiates between on-premise and off-premise advertising. N.D.C.C. 24-17-03(2), N.D.C.C. 24-17-03(3), App. 12e.

With regard to the test of whether the law serves a significant governmental interest, the lower court took pains to find such significance but appellant contends it does not exist. The law states many legitimate purposes for the use of the police power. They are alluded by the lower court. But the question is not what is "legitimate", but rather what is "significant." To say that the purposes are significant merely because they are stated is to reduce the significance test to the same level as any other police power action where fundamental rights are not involved. For the North Dakota court to speculate on the basis for the legislative findings is not close inspection. Speculation has no more place in the judicial process emanating from the court than it does from a witness. To give the legislative act presumption of validity and to search for justification of legislative purposes where no evidence exists supporting it defies this Court's longstanding cautious approach to encroachment in the area of fundamental rights. What is a significant governmental interest? It seems to appellant that the interest should relate to the speech to fall within the threefold test of *Va. Pharmacy Bd.*, such as regulation of false, deceptive, or misleading speech. And see *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977); *Ohralik v. Ohio State Bar Ass'n.*, ____ U.S. ____, 56 L.Ed.2d 444, 457 (1978). If it does not so relate to the

speech itself then the fourfold test of *United States v. O'Brien*, 391 U.S. 367, 376-377 (1978) seems more appropriate and the intrusion here by the North Dakota law goes far beyond the limits of "restriction no greater than, is essential to further" the nonspeech interest. Here, where the regulation overlaps into non-commercial speech, it must meet the test of strict judicial scrutiny with closely drawn legislation furthering a subordinating interest which is compelling. *In re Primus*, ____ U.S. ____, 56 L.Ed.2d 417, 434-435.

Recently this court has said that "deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communication, Inc. v. Virginia*, ____ U.S. ____, 56 L.Ed.2d 1, 13 (1978) (see *Elrod v. Burns*, 427 U.S. 347, 426 (1976). The rule applies equally to administrative decisions.

The lower court opinion rings with the echo of hollowness for lack of evidentiary support or legislative history to sustain the legislative purposes declared in the North Dakota law. Even if the test of significant governmental interest is weakly applied, the law does not pass the constitutional muster. In reverse order, the lower court found the significant governmental interests here to be: A. *A safe and visually pleasing environment.* There is no evidence on safety, only the court's conjecture and speculation. The court refers to the many scenic areas along the North Dakota highways, but fails to recognize that the better policy would be to designate such areas and allow signs elsewhere rather than ban signs everywhere for the sake of the scenic areas. If it weren't for the free speech interests, perhaps the decision would withstand attack, but here it cannot. B. *Privacy of those who use the highway.* The better

reasoning today is found in fn. 25 of *Ohralik*, p. 459, 56 L.Ed.2d, that the reader of an advertisement can avert his eyes. To hold contrary is to jeopardize TV, newspaper and other visual media. It is really the content of advertising which those media contain as they enter the home which is the real concern of the invasion of privacy issue. Outside the home persons must forfeit the right to privacy to one degree or another. See *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 210-211 (1975). Outdoor advertising is not incompatible with the normal activity of the public highway. *Grayned v. City of Rockford*, 408 U.S. 104, 175 (1972). There are signs on and along the highways continuously located on buildings, trucks, automobiles and even license plates.

The North Dakota decision also finds there are ample alternate means. But it does not state them with any particularity. Appellant's exercise of freedom of expression in the appropriate forum of the public thoroughfare should not be abridged on the plea it may be exercised elsewhere. *Schneider v. State*, 308 U.S. 147, 163 (1939).

Appellant has challenged the constitutionality of all the various rules and regulations here, but those challenges were not ruled on by the lower court because it found the appellant, through its own action (or lack of it) and that of its President, Harold Newman, sought and accepted benefits of the permit system regulations which estopped appellant from attacking the rules or regulations. This is an insidious rule of law, especially when associated with fundamental rights. Simply stated it says "if you wish to exercise the freedom of expression you must obtain a

permit and once having done so you are forever barred from attacking our right to demand this of you." The theory of estoppel envisions a detriment in the party seeking the estoppel and sometimes a benefit in the party estopped. Appellant had the right of free speech and the right to be in a legitimate business before and after the various rules were adopted. There was no detriment to the appellees and no benefit to appellant when it sought and obtained permits because the right to erect signs existed independent of the rule. The waivers were not entered into voluntarily and there was no consideration for any estoppel or contractual undertaking.

On each of the grounds stated in each question presented herein, appellant challenges the statutes, administrative rules and regulations and policies as the law of the state.

II.

THE DECISION IS IN CONFLICT WITH *LANDMARK COMMUNICATION, INC. V. VIRGINIA* ____ U.S. ____, 56 L.Ed.2d 1 (1978) IN THAT IT GIVES DEFERENCE TO LEGISLATIVE FINDINGS AND LIMITS JUDICIAL INQUIRY WHERE FIRST AMENDMENT RIGHTS ARE AT STAKE.

The discussion of this question is found under question I and question VII.

III.

THE DECISION IS IN CONFLICT WITH *IN RE PRIMUS* ____ U.S. ____, 56 L.Ed.2d 417 (1978) IN THAT IT FAILS TO APPLY THE EXACTING SCRUTINY APPLICABLE TO LIMITATIONS ON FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH.

The discussion of this question is found under question I.

IV.

THE DECISION IS IN CONFLICT WITH *GRAYNED V. CITY OF ROCKFORD*, 408 U.S. 104 (1972) IN THAT THE STATE LAW IS TOO VAGUE IN VIOLATION OF THE PRINCIPLES SET FORTH THEREIN.

This Court has frequently indicated the special caution with which it views statutes limiting freedom of expression. In *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) the court said:

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."

And in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-218, (1975) in which the court stated "Where First Amendment freedoms are at stake . . . precision of drafting and clarity of purpose are essential."

The state law as construed herein fails to define advertising and fails to define the words "commercial" or "industrial". No rules or regulations have ever been adopted to define those terms, and there never has been any zoning of such areas undertaken by the Board.

There has been no comprehensive plan adopted by the Board as required by N.D.C.C. 24-17-09(2). There are no standards to apprise the appellant of what is prohibited and what is permissible. Until 1972 there was no agreement with the federal government although much of the regulatory part of the law was based on the necessity of an agreement. See N.D.C.C. 24-17-03(5), N.D.C.C. 24-17-09(2)(f), 23 U.S.C. 131(d).

The court below has determined that the appellant's signs which existed prior to the adoption of the Federal Highway Beautification Act, on October 22, 1965, and which have been expanded or changed in some manner are unlawfully expanded because they are expansions of a nonconforming use. N.D.C.C. 24-17-09(2)(b) allows for the regulation of reconstruction, alteration, and repair but no rules or regulations were ever adopted by the Board to carry out such authority.

Finally, the North Dakota law states in section 1 of Chapter 24-17 that it is adopted pursuant to the federal law and the "rules and regulations promulgated thereunder." However, there were no federal rules and regulations adopted for the control of outdoor advertising until July 9, 1973. Appellant attempted to establish what rules and regulations existed, if any, so that it could operate its business accordingly, but because there were no rules and regulations until 1973, the Highway Commissioner simply kept changing the regulations as the federal government issued proposed regulations.

The foregoing demonstrates the North Dakota law is unconstitutionally vague.

V.

A STATE MAY NOT SUMMARILY, BY ADMINISTRATIVE DETERMINATION, DETERMINE A PERSON'S SIGN TO BE ILLEGAL AND PROVIDE THAT IF AFTER THIRTY DAYS' NOTICE TO THE OWNER OF THE SIGN IT HAS NOT BEEN REMOVED, THE SIGN IS DEEMED ABANDONED AND SUBJECT TO REMOVAL BY THE STATE WITHOUT LIABILITY ON ITS PART, ALL WITHOUT HEARING OR NOTICE OF OPPORTUNITY FOR HEARING.

The North Dakota court found that N.D.C.C. 24-17-11 does not violate procedural due process. The section does not provide for a hearing either before or after administrative decision that a sign is illegal or does not conform to rules and regulations. In addition to defects of procedural due process the section, by reference thereto, suffers from the constitutional infirmities of the entire state law in question here which constitutional infirmities are set forth under other questions herein. The section gives absolute authority to the Commissioner to declare property illegal and abandoned if not removed within thirty days and to terminate the liberty of freedom of expression in so doing. There is no provision for the payment of just compensation, in fact, the statute expressly

authorizes the Commissioner to act without recourse for damages for his actions. The only recourse to an owner of a sign is judicial process which creates a chilling effect upon the exercise of the right of freedom of expression and is certainly not practical for each and every sign questioned by the state.

"It is procedure that marks much of the difference between rule by law and rule by fiat". *Wisconsin v. Constantineau,* 40 U.S. 433, 436 (1971). Attached hereto in App. F are sample notices of letters to sign owners for removal of signs which demonstrates the unconstitutionality of the law in its operation as applied to Appellant, App. 1f, including its vagueness.

Most recently this court has spoken to procedural due process in *Memphis Light, Gas and Water Div. v. Craft,* ____ U.S. ____, 56 L.Ed.2d 30 (1978) where the court said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." p. 41
>
> "This Court consistently has held that 'some kind of hearing is required at some time before a person is finally deprived of his property interest.' " p. 43

The Supreme Court of North Dakota failed to apply the tests set forth in the *Memphis* case which are:

> ". . . due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous determination of such interest through the procedures used, and the

probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural safeguards would entail." p. 44

Certainly where large numbers of signs of differing values and subject to various rules and regulations are involved judicial process or injunctive relief are too bounded by procedural constraints and too susceptible to delay to provide effective safeguards against erroneous deprivation of property rights and First Amendment rights. See *Memphis*, p. 44, and see *Mathews v. Eldridge*, 424 U.S. 319 (1976).

VI.

THE DECISION IS IN CONFLICT WITH *MEMPHIS LIGHT, GAS AND WATER DIV. V. CRAFT* ____ U.S. ____, 56 L.Ed.2d 30 (1978) IN THAT THE STATE LAW, AND PARTICULARLY SECTION 24-17-11 N.D.C.C., IS NOT REASONABLY CALCULATED TO INFORM OF AN OPPORTUNITY TO PRESENT OBJECTIONS OR TO ALLOW OPPORTUNITY FOR HEARING PRIOR TO DEPRIVATION OF PROPERTY INTERESTS.

The discussion of this question is found under question V.

VII.

THE STATE LAW'S DISCRIMINATION AGAINST THE CLASS OF SIGNS PROHIBITED VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The state law as construed is unconstitutional in its application to the appellant and it is unconstitutional on its face. In spite of the attempt of the lower court to justify the North Dakota law by elevating the legislative purposes to judicial protection not afforded when fundamental rights are at stake, (see *Landmark*, supra) the only purpose or reason for the enactment of the North Dakota Highway Beautification Act, and for the administrative actions taken, was that the Federal Highway Beautification Act of 1965 provided for a penalty against the states if they did not take action. But for the penalty provision, there would have been no action, administrative or legislative, taken in the state of North Dakota. 23 U.S. 131(b), R. 828.

That the public thoroughfare is an appropriate forum for the freedom of expression is such a well-established principle that citations would be superfluous. The law of North Dakota now gives access to that forum for various on-premise signs, for signs on trucks, signs on automobiles, signs on buildings and even signs in the sky. However, appellant's signs in question here, that is those which are not in commercial or industrial areas or not in municipalities, are not allowed. Between on-premise signs and off-premise signs the North Dakota law discriminates based on content. A sign, if it advertises the sale or lease of the property upon which

it is located, or if it advertises activities conducted, services rendered, goods sold, stored, produced or mined, or the name of the enterprise on the property on which it is located and is within fifty feet of the area used for that purpose may be located adjacent to the state highway system. However, if the same sign, in the same location, being the same size and with all other qualities, except content, is changed to advertise a business one hundred feet away, one mile away, or to promote a political or social idea, it is not allowed. N.D.C.C. 24-17-03.

To paraphrase *Young v. American Mini Theatres,* 427 U.S. 50, 65, reh. den. 429 U.S. 873 (1976) under the equal protection clause, not to mention the First Amendment itself, North Dakota may not grant access to those on the state highway system to people whose signs it finds acceptable, but deny access to those wishing to express other types of messages found less favored. It may not select signs which are worth locating adjacent to the public thoroughfare. "There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assemblying or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." See *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95-96 (1972).

The Court in *Young* then proceeded to examine many cases in which governmental regulation based on content has been found acceptable. It cites the

Markham case as acceptable discrimination along with two cases which involve either deceptive speech or no public forum at all. 427 U.S. at 68. However, *Young* recognizes that the language of *Mosley* is the rule rather than the exception, and this appellant submits that the instant case does not fall within the permissible scope of exceptions as established by this Court and that this case is not the *Markham* case. The very fact that there is idealogical communication through appellant's signs defeats the state law here, but even if this case were examined as purely a commercial speech question appellant submits it does not meet the strict tests established by this Court. See Ex. 58, p. 199, and see *Young*, 427 U.S. fn. 32 at 69.

Even if all of the purposes stated by the legislature of North Dakota were accepted as being significant governmental interests on their face, the North Dakota law is not narrowly tailored to meet those legislative objectives. *Police Department of Chicago v. Mosley,* supra at 101. An examination of the cases cited in *Young* at pages 64 and 65 reveal that each was a narrowly tailored exception to the general rule. However, *Markham* was not such an exception, was not narrowly tailored, and did not receive the benefit of plenary consideration by this Court. Considering all signs which are allowable in the forum here restricted, and comparing them to signs of appellant, leads one to the conclusion that there is invidious discrimination which does not have a reasonable relation to the ends sought. Those allowed are no more safe or aesthetic and invade privacy no less than Appellant's signs.

One final observation on the discriminatory effect against the appellant is necessary. Apparently the Court

will continue to use the alternate means test as one of the methods to determine whether or not there is permissible regulation of commercial speech. Assuming, *arguendo,* that other cases will come before the Court involving other media in which the alternate means test will be applied, will it not be argued that the alternate means of the outdoor advertising media is substantially restricted due to the kind of law in question here? Such an argument appears valid, but it also demonstrates that the appellant, as a part of the outdoor advertising media, suffers from discrimination *vis-a-vis* other media because of this law.

Appellant also submits that the North Dakota law is unconstitutional on its face. The law is not permissive, it is exclusionary and restrictive. It brings within its sweep various types of signs carrying almost all conceivable kinds of messages even to the extent of prohibiting privately owned signs of an individual erected on his own property and expressing ideological ideas.

The sign in a municipality is allowed. The sign immediately across the municipal boundary is not allowed. A person with property adjacent to a highway on the state highway system may not erect a sign expressing his views which can be seen by those passing by on the public thoroughfare. However, a neighbor, with property that is not adjacent to the state highway system, but, nevertheless, on a road not included in the system, may freely express his opinion by the use of a sign directed at the passing traffic on that public thoroughfare.[13] Signs promoting other fundamental rights are affected. Although on-premise commercial expression is generally

[13]Only part of the state's roads are in the state highway system. See N.D.C.C. 24-01-01.1(42) & 24-01-02, 03.

allowed, religious, associational, or travel messages are not allowed. This Court has recognized that the right to advertise presumes a reciprocal right to receive the advertising. *Virginia Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 757 (1976). The limiting effect on the right of the public to be informed resulting from the law in question here is obvious. The law strikes particularly hard at ideological communications because ideological communication would rarely lend itself to on-premise signs.

In *Dandridge v. Williams,* 397 U.S. 471 (1970) reh. den. 398 U.S. 914, p. 484, the Court said "When otherwise valid government regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional". If the law's deterent effect on legitimate expression is real and substantial, and if the law is not subject to narrowing construction by the state court, then it is subject to attack on the basis of its overbreadth. See *Young v. American Mini Theatres, Inc.,* supra, at p. 60 and *Erzoznik v. City of Jacksonville,* supra, at p. 216. The North Dakota law significantly overreaches by impinging upon First Amendment activity in a real and substantial manner not subject to narrowing construction.

In *Grayned v. City of Rockford,* 408 U.S. 104 (1972) the Court said the "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." The public thoroughfare has been the forum for signs similar to appellant's for hundreds of years.

The constitution does not permit the overbreadth of the North Dakota law.

VIII.

THE DECISION IS IN CONFLICT WITH *GRAYNED V. CITY OF ROCKFORD*, 408 U.S. 104 (1972) IN THAT THE STATE LAW IS TOO OVERBROAD IN VIOLATION OF THE PRINCIPLES SET FORTH HEREIN.

The discussion of this question is found in question VII.

IX.

THE STATE LAW AS CONSTRUED UNCONSTITUTIONALLY DENIES APPELLANT THE RIGHT TO BE ENGAGED IN A LAWFUL BUSINESS INVOLVING FIRST AMENDMENT RIGHTS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The right to work for a living is of the very essence of personal freedom and opportunity as guaranteed by the Fourteenth Amendment. *In re Griffith*, 413 U.S. 717, 720 (1973). A state cannot exclude a person from any occupation in a manner or for reasons that contravene the due process or equal protection clauses of the Fourteenth Amendment. *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957). Appellant recognizes the many decisions of this court allowing regulation of a lawful business, but it remains the law of this Court that "to justify the State in . . . interposing its authority in behalf of the public it must appear, first, that the interests of the public . . . require such

interference [with personal or property rights] . . ." *Lawton v. Steele*, 152 U.S. 133, 137 (1894), quoted as "still valid today" in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962); see also *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), where the Court in invalidating a zoning ordinance in its application relied in part on the findings below that "the health, safety, convenience and general welfare" would not be promoted by the ordinance in its effect on the property."

When the lawful occupation to be regulated is one in which free speech interests are involved, then the regulation becomes a regulation of speech as well as occupation. The initial regulation of appellant's business was done without hearing, arbitrarily, and with only an administrative determination. App. E.3.a. The Commissioner's rule and regulation really amounted to an absolute prohibition which constitutes prior restraint. *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963). There were no procedural safeguards and there was no authority for the Commissioner to take such action either constitutional or legislative. The interim policy of the Commissioner invoked later (App. E.3.b.), was invalid for the same reasons. Surely, the lower court is mistaken in stating, without citation of authority, that "the authority to impose terms in giving a permit is necessarily implied from the right to grant the permit". App. 19a. Had the Commissioner's action been lawful, then *reasonable* terms could have been attached to the permit, but appellant submits that the terms and conditions of the waiver were not reasonable and, in any event, unlawful and unconstitutional.

North Dakota law required statutory authority and reasonableness for the Commissioner's action which appellant questioned and which the lower court did not find. N.D.C.C. 28-32-02.[14] If N.D.C.C. 24-04-01 is deemed the legislative authority then appellant challenges its constitutionality under all of the questions raised herein.

The Board's interim policy was adopted without hearing and without due process safeguards. App. E.3.c. The Board was without statutory authority to require the waiver of compensation. The lower court could not find that the Board's interim policy was lawfully adopted, but it found that the appellant was estopped from contesting the validity of the Board's interim policy for reasons set forth earlier in this jurisdictional statement. App. 22a. With no rules, how could there be constitutional regulation?

In *W.W. Cargill Co. v. Minnesota*, 180 U.S. 452 (1901) the Court, at page 468, said a state may require a license for the privilege of carrying on a lawful business for the purpose of regulation, but not for the purpose of forbidding a business lawful or harmless in itself. And then the court went on to say in *Cargill* that

> "A license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or any regulations prescribed by the state . . . that are repugnant to the constitution of the United States."

The North Dakota court found (see App. 8a) that

> "Newman protested the waiver language contained in the permit during the Highway Corridor Board's meetings, without success. In order to maintain his business he complied with the permit procedure, but filed written protests along with some of his applications for permits."

Therefore the waiver was not entered into voluntarily by appellant, and there was certainly no consideration for any purported contractual obligation.

If there is any lawful regulation of appellant's business, and appellant does not concede that such lawful regulation exists, then it did not begin until the adoption of rules and regulations by the Board on August 1, 1973.

[14] Rules and regulations must be "reasonable" and be "in conformity with the provisions of any statute administered or to be administered, enforced or to be enforced, by" the Commissioner. N.D.C.C. 28-32-02.

X.

THE DECISION IS IN CONFLICT WITH *W.W. CARGILL CO. V. MINNESOTA*, 180 U.S. 452 (1901) IN THAT IT IMPOSES UPON APPELLANT THE OBLIGATION TO COMPLY WITH REGULATIONS REPUGNANT TO CONSTITUTIONAL RIGHTS.

The discussion of this question is found in question IX.

XI.

THE STATE LAW AS CONSTRUED AND APPLIED TO APPELLANT CONSTITUTES THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT THE PAYMENT OF JUST COMPENSATION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Court's decisions establish that regulation of the use of property is permissible under the police power, but regulation that goes too far in impairing property values cannot be justified as an exercise of the police power and the power of eminent domain must be invoked. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413, 415 (1922); *United States v. Causby,* 328 U.S. 256, 262 (1946). The criterion for how far is too far is "reasonableness," *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962), and reasonableness depends on (1) the extent of the impairment of property values and (2) the necessity in the public interest, of the regulation, cf. *Lawton v. Steele,* 152 U.S. 133, 137 (1894). The Supreme Court of North Dakota properly set forth the criteria in its opinion, but those criteria are misapplied and contrary to the decisions of this Court.

The appellant has earlier taken up the question of whether the North Dakota law is reasonably related to a proper purpose under the state's police power. It was not. Therefore, there is a failure of the second criterion in that the necessity of the regulation in the public interest does not exist.

The lower court also invoked a presumption of the validity of the North Dakota law, but that presumption does not exist here in favor of either statutory or administrative law due to the fundamental right interests involved. *Landmark Communication, Inc. v. Virginia,* ____ U.S. ____, 56 L.Ed.2d 1 (1978).

The North Dakota court further determined that the extent of the impairment of the appellant's property values did not deprive the appellant of all or substantially all of the beneficial use of its property. However, this conclusion fails to recognize that the property interests involved are not those of the landowner, but those of the appellant in its signs and its leasehold interests. Each individual sign must be considered as property, and each individual leasehold interest is a properly compensable property interest. The court below further found that amortization is a constitutionally acceptable way of compensating the appellant where compensation is due pursuant to its decision. However, the judgment of the North Dakota court is contrary to and fails to recognize what this Court has recognized in *Almota Farmers E. & W. Co. v. United States,* 459 U.S. 470 (1973) that property of a lessee located on the lessor's fee is compensable property, not necessarily related to the term of the lease, and is entitled to be independently valued.

XII.

THE STATE LAW AS CONSTRUED AND APPLIED TO THE APPELLANT IS REPUGNANT TO SUBSECTIONS (g) AND (n) OF 23 U.S.C. 131 AND SECTION 401 OF PUB. L. NO. 89-285.

Chapter 24-17 N.D.C.C. was enacted pursuant to 23 U.S.C. 131. See N.D.C.C. 24-17-01. N.D.C.C. 24-17-05 provides "no sign shall be required to be removed . . . unless . . . federal funds are allocated . . . appropriated and are available to this state."

23 U.S.C. 131(g) provides "just compensation shall be paid upon the removal of any . . . sign . . . lawfully erected under state law."

The decision below finds that the signs of appellant were lawfully erected under state law if a permit was issued and the sign erected under the permit. However, because the permits contained a waiver of compensation the court held that appellant will not receive just compensation for the signs upon removal. For this reason the appellant contends the state law is repugnant to the federal law because the law as construed denies appellant just compensation for signs lawfully erected.

The decision below also holds that there is a five year amortization period for appellant's signs which reduces the compensation to appellant upon removal. For this reason appellant contends the state law is repugnant to the federal law because amortization is not just compensation. (See *Vermont v. Brinegar*, 379 F. Supp. 606 (Dist. Vt. (1974)).

CONCLUSION

In upholding the constitutionality of the North Dakota law, the Supreme Court of North Dakota has ignored fundamental First Amendment principles. The questions presented by this appeal are so substantial as to require plenary consideration and appellant urges this Court to note probable jurisdiction of this appeal, or, in the alternative, grant a writ of certiorari to review the judgment below, and set the case down for argument.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE SUPREME COURT OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

NEWMAN SIGNS, INC.,
a North Dakota Corporation,

Plaintiff, Appellee, and Cross-Appellant,

v.

WALTER R. HJELLE,
as North Dakota State Highway Commissioner,
and North Dakota Highway Corridor Board,

Defendants, Appellants, and Cross-Appellees.

Civil No. 9394

Appeals from the District Court of Cass County, the Honorable Ralph B. Maxwell, Judge.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

Opinion of the Court by Vogel, Justice.

Edmund G. Vinje II, of Hjellum, Weiss, Nerison, Jukkala & Vinje, Jamestown, for plaintiff, appellee,

and cross-appellant Newman Signs, Inc.

Albert A. Wolf, Special Assistant Attorney General, Bismarck, for defendant, appellant, and cross-appellee Hjelle.

Max D. Rosenberg, Special Assistant Attorney General, Bismarck, for defendant, appellant, and cross-appellee North Dakota Highway Corridor Board.

Civil No. 9394

Newman Signs, Inc. v. Hjelle

VOGEL, Justice.

This appeal involves the interpretation of the Federal "Highway Beautification Act of 1965," 23 U.S.C. 131, and the North Dakota Highway Beautification Act, Chapter 24-17, North Dakota Century Code. There were three actions in the district court, two commenced by Newman Signs, Inc. (hereinafter Newman), and one by Walter R. Hjelle, as North Dakota State Highway Commissioner (hereinafter Commissioner). The North Dakota Highway Corridor Board (hereinafter Board) was a defendant in an action brought by Newman. By agreement, the three actions were consolidated into one, in which an amended complaint was filed, and the consolidated action was tried in Cass County district court. The amended complaint in the consolidated action contains five counts, each relating to a separate category of

outdoor advertising signs, with a sixth count as to damages. The trial related only to the first five counts, with the sixth count reserved for future determination.

All parties appealed from the judgment of the district court. In addition to questions of interpretation of the Federal and State statutes, constitutionality of the latter is also challenged. We reverse the judgment of the district court in part and remand for further proceedings.

The Federal Act was enacted in 1965 and was designed to persuade the States, by means of financial incentives, to use their police power to control the erection and maintenance of outdoor advertising structures adjacent to the Interstate and primary highway systems. In order to avoid losing 10 percent of the State's share of Federal-aid highway funds (approximately $3,000,000 per year in North Dakota, we are advised), each State must provide for "effective control" of advertising structures situated within 660 feet of the nearest edge of the right-of-way and visible from the main traveled way of the system.[1]

Effective control had to be provided by January 1, 1968, in order to comply with the Act as original drafted. "Effective control" was defined in the Act, 23 U.S.C. 131(c), as meaning that:

> " . . . after January 1, 1968, such signs, displays, and devices shall, pursuant to this section, be limited to (1) directional and other official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attrac-

[1]This provision was expanded later to include signs beyond 660 feet and visible from the highway.

tions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary [of Commerce, later by the Secretary of Transportation] hereunder, which standards shall contain provisions concerning the lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, and (3) signs, displays, and devices advertising activities conducted on the property on which they are located."[2]

Section 131(b) allowed the Secretary to waive the 10-percent penalty if a State had not complied with requirements for effective control, under certain conditions. It provided:

"Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State."

The Federal Act further provides, in subsection (d), that advertising signs, displays, and devices could be maintained within 600 feet of the nearest edge of the right-of-way, but only in areas which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary, provided that the signs, displays, and devices conform in size, lighting, and spacing to the agreement between the several States and the Secretary which is consistent with customary use. In the case of

[2]This definition was subsequently amended by wording not material to this appeal.

North Dakota, there was considerable controversy over several years as to the contents of any agreement to be signed in conformity with this subsection, and the agreement was finally signed on January 19, 1972. The district court determined that there was no control over advertising signs until the latter date.

The Act also provides for payment of just compensation to the owners of outdoor advertising signs along the Interstate and primary highway system upon the removal of certain enumerated advertising structures, with the Federal Government providing 75 percent of the compensation. However, in order to be eligible for the 75-percent share, a State must have entered into an agreement with the Federal Government to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate system [subdivision (j)].

Subdivision (e) provides for a grace period until July 1, 1970, of signs lawfully in existence on September 1, 1965, and for a five-year grace period of nonconforming signs later erected lawfully.

The first session of the North Dakota Legislature after the passage of the Federal Act was the 1967 legislative session. Between the passage of the Federal Act and the convening of the 1967 legislative session, the Commissioner, after obtaining an opinion of the North Dakota Attorney General that he was authorized to do so, issued rules and regulations governing outdoor advertising along Interstate and primary highways and prohibiting

". . . establishment of billboard advertising along interstate and primary highways in the State of North Dakota . . . within 660 feet from the nearest

edge of the right of way unless permission . . . is requested in writing and . . . granted in writing by the North Dakota State Highway Commissioner."

This was on December 3, 1965.

In April 1966 the Commissioner issued an interim policy to provide for controlled erection of advertising structures until final standards were promulgated by the Board in agreement with the Secretary of Commerce. It provided for permits to be issued under certain circumstances "for a term extending to January 1, 1970, unless sooner invalidated by agreement between the State Highway Commissioner and the Secretary of Commerce or by standards adopted by the Secretary of Commerce, at which time the sign must be removed by the permittee unless extended by the State Highway Commission. The permittee must agree to save the State harmless from any costs or liabilities arising from the removal of the sign and cancellation of the lease between sign owner and landowner."

The North Dakota Legislature enacted the North Dakota Act, with an emergency clause which made it effective February 28, 1967. The Act was codified as Chapter 24-17, N.D.C.C.

Section 1 of the Act [24-17-01, N.D.C.C.] declared a public policy to regulate, but not prohibit, outdoor advertising

"through zoning principles and standards consistent with the public policy relating to the areas adjacent to the state highway system pursuant to title 23, United States Code, section 131 and section 319 and rules and regulations promulgated thereunder."

Section 24-17-03, N.D.C.C., provided:

"Subject to the provisions of this Act, no sign shall, after January 1, 1968, be erected or maintained within six hundred and sixty feet from the nearest edge of the right-of-way and visible from the main traveled way of any highway which is a part of the state highway system in this state except the following:

"1. . . .
"2. . . .
"3. . . .
"4. Signs in areas which are now or hereafter zoned industrial, commercial, or the like by the board as provided in this Act.
"5. Signs in unzoned commercial or industrial areas, which now or hereafter qualify as such, pursuant to the agreement between the board and the secretary of transportation according to title 23, United States Code, section 131.
"6. . . .
"7. . . .
"8. . . .

Section 24-17-04, N.D.C.C., contained provisions for removal of signs.

Compensation was provided for removal of certain signs in Section 24-17-05, N.D.C.C., which will be discussed later in this opinion.

The North Dakota State Highway Corridor Board was created as an agency of the State and was composed of five members, one of whom was a representative of the North Dakota Outdoor Advertising Association. The first such representative was Harold Newman, the president of Newman Signs, Inc. The duties and powers of the Board were set forth

in Section 24-17-09, N.D.C.C., and, where relevant, will be discussed later in this opinion.

Section 24-17-11, N.D.C.C., declares illegal any signs which violate Chapter 24-17 or the Corridor Board's regulations, provides for notice to the owner to remove prohibited signs, and provides that the Commissioner may remove such signs if the owner fails to act or if the sign is abandoned.

Section 24-17-15, N.D.C.C., sets forth the manner in which one aggrieved by a decision of the Board may appeal. Appeals from such decisions are to the district court and Supreme Court in accordance with Sections 28-32-15 through 28-32-21 (which are the parts of the North Dakota Administrative Agencies Practice Act relating to appeals), but no other sections of Chapter 28-32 apply to the proceedings of the Board.

The Highway Corridor Board met and adopted an interim policy covering outdoor advertising which was similar to the policy of the Highway Commissioner. Newman voted against the interim policy. The language in the Board's permit stated, in capital letters:

> "UNDER NO CIRCUMSTANCES WILL THE PERMITTEE BE PAID JUST COMPENSATION FOR THE REMOVAL, CHANGING, ALTERING OR MODIFICATION OF ANY SIGN, DEVICE OR DISPLAY ERECTED BY VIRTUE OF THIS PERMIT AND THE PERMITTEE EXPRESSLY WAIVES HIS RIGHTS, IF ANY, TO SUCH COMPENSATION."

Newman protested the waiver language contained in the permit during the Highway Corridor Board's meetings, without success. In order to maintain his

business he complied with the permit procedure, but filed written protests along with some of his applications for permits.

The Board's interim policy was submitted to the Attorney General for approval as to legality, which was given. On December 8, 1967, the Board published notice of a public hearing on its rules and regulations for placement of outdoor advertising signs. The Board held one hearing on proposed rules and regulations on January 24, 1968.

On July 1, 1969, an amendment to Section 24-17-03, N.D.C.C., became effective. It provided:

> "Subject to the provisions of this chapter, no sign shall, after January 1, 1968, *or any later date established by the Congress of the United States in relation to title 23, United States Code, section 131, or waiver thereof pursuant to said title 23*, be erected or maintained within six hundred and sixty feet . . . [Underlined portion indicates new language.]

On January 6, 1972, the Commissioner was informed by the Secretary of Transportation that the State of North Dakota must execute an agreement with the Secretary of Transportation by January 20, 1972, or it would not be in compliance with the Federal Act and therefore would be penalized by not receiving 10 percent of its Federal aid. An agreement between the State of North Dakota and the Secretary of Transportation was executed, effective as of January 19, 1972.

The North Dakota Highway Corridor Board met on August 1, 1973, and adopted with some amendments the regulations which had previously been published and noticed for hearing on January 24, 1968.

In early 1975, 23 U.S.C. 131 was amended to provide in subsection (g) that "Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law."

During 1972, the Highway Department began removing nonconforming signs erected prior to December 3, 1965, and did not provide compensation for those signs erected thereafter without permits or under the interim policy. Newman objected to the removal of its signs without just compensation, and this action followed:

The issues raised by the parties, as restated by us, are:

1. When did the legal prohibition against erection of nonconforming outdoor advertising signs become effective—December 3, 1965 (date of first rules and regulations issued by the Commissioner); January 1, 1968 (date specified in the North Dakota Highway Beautification Act); January 19, 1972 (date agreement between North Dakota and the Secretary of Transportation was executed); or August 1, 1973 (date Board formally issued rules and regulations)?

2. Whether signs erected after December 3, 1965, pursuant to the Commissioner's and the Board's interim policies requiring a permit containing provisions for removal of signs without compensation, were lawfully erected under State law, requiring just compensation for damages upon removal.

3. Whether Newman, as a member of the Board during the period in controversy, , estopped from relying upon inaction of the Board in promulgating rules and regulations.

4. Whether Newman in entitled to compensation for damages resulting from the removal of signs which

existed prior to the effective date of the Act which were expanded, reconstructed, or substantially altered later.

5. Whether signs erected without a permit upon property, the advertising rights on which had been previously purchased by the Highway Department, are signs lawfully erected under State law, requiring just compensation upon removal.

6. Whether Chapter 24-17, N.D.C.C., is unconstitutional because it—

a. permits the taking of private property for public use without payment of just compensation, or

b. creates an unconstitutional classification, or

c. violates due process of law, contrary to Section 13 of the Constitution of North Dakota and the Fourteenth Amendment of the Constitution of the United States, or

d. violates the First Amendment guarantee of freedom of speech, or

e. contains an unconstitutional delegation of power to legislate to a Federal administrator.

DECISION

Issue 1:

Effective date of prohibitory and regulatory provisions of the 1967 North Dakota legislation

The Act was passed by the 1967 Legislature with an emergency clause, making it effective upon the signature of the Governor on February 28, 1967. (Chapter 291, 1967 Session Laws, codified as Chapter 24-17, N.D.C.C.)

Section 3 [24-17-03, N.D.C.C.] provided, prior to the 1969 amendment referred to below:

> "Subject to the provisions of this Act, no sign shall, after January 1, 1968, be erected or maintained within six hundred and sixty feet from the nearest edge of the right-of-way and visible from the main traveled way of any highway which is a part of the state highway system in this state except [certain enumerated exceptions]."

We are satisfied that the meaning of Section 3 [24-17-03, N.D.C.C.] as originally adopted is that no outdoor advertising sign, aside from those specifically excepted by the terms of Section 3, could lawfully be erected or maintained after January 1, 1968. Any advertising signs erected or maintained in violation of that prohibition were illegal and subject to removal without payment of just compensation.[3] Signs erected prior to January 1, 1968, in conformity with prior law would be considered lawfully erected, and, if conforming to the new statute, could continue to exist. If not in conformity with the new statute, they would be permitted to exist for five years or until July 1, 1970, whichever came later. If acquired by the Commissioner pursuant to Section 5 [24-17-05, N.D.C.C.],[4] just compensation must be paid.

For several years after the passage of the Federal Act, the Congress appropriated only small sums of money to put it into effect. The Secretary of Commerce, and later the Secretary of Transportation,

[3]The constitutionality of this provision is discussed later in the opinion.

[4]This section was amended in 1975 and the amendment was not discussed by the parties.

to whom enforcement of the Act was transferred, chose to suspend the provisions of 28 U.S.C. 131(b) as to reducing highway funds to the States by 10 percent if they were not exercising effective control of outdoor advertising.

In 1969, the North Dakota Legislature amended 24-17-03 by adding the language underlined below, so that the section reads:

> "Subject to the provisions of this chapter, no sign shall, after January 1, 1968, *or any later date established by the Congress of the United States in relation to title 23, United States Code, section 131, or waiver thereof pursuant to said title 23,* be erected or maintained within six hundred and sixty feet from the nearest edge of the right-of-way and visible from the main-traveled way of any highway which is a part of the state highway system in this state except the following: [enumerated exceptions]."

Newman argues that this amendment, when read with the Federal Act and the waiver of penalty to be imposed upon States not exercising effective control, means that the prohibition against erecting and maintaining outdoor advertising after January 1, 1968, was postponed until such later date as the State was found to be exercising effective control, or such later date as the Board adopted rules and regulations. Apparently the district court agreed in part with this argument, since it held that the Act became effective on January 19, 1972, when the Commissioner signed an agreement with the Secretary of Transportation defining "unzoned industrial and commercial areas" and defining the size, lighting, and shape of conforming signs. The adoption of rules and regulations by the

Board came on August 1, 1973, and that is the date which Newman claims to be the effective date.

We have carefully examined all the language and history cited to us by the parties, and we cannot find that the subsequent legislation or the acts of the State or Federal authorities changed the effective date of the prohibitions of the North Dakota Act from January 1, 1968, the date specified in the Acts and never modified. The addition of the language as to a "later date established by the Congress . . . or waiver thereof" did not change the date of January 1, 1968, contained in the North Dakota Act. The same date also continued to be specified in the Federal Act. It was never amended out of the Federal Act, nor was it waived. All that was waived by the Federal Government was the 10 percent penalty provision of 23 U.S.C. 131(b). The date of January 1, 1968, remained in the Federal Act, not only in 131(b), but in several other places as well. There was no "later date established by the Congress . . . or waiver thereof."

As was said in a very similar case decided by the Court of Appeals of Louisiana, *State, Dept. of Hwys. v. Lamar Adv. Co. of La., Inc.,* 304 So.2d 779, 784 (La.App. 1974),

> "In the present case, if the Legislature had not intended the statute to become effective until the Highway Department issued further regulations or until the compliance agreement was entered into, it would have been very simple for the Legislature to state this in the statute. The courts should not imply that the Legislature intended a special effective date unless such implication is so clear as to admit of no other reasonable interpretation."

We hold that the prohibitory and regulatory provisions of the 1967 North Dakota legislation became effective January 1, 1968, the date specified in the Act.

Issue 2:

Whether signs erected after December 3, 1965, pursuant to the Commissioner's and the Board's interim policies requiring a permit containing provisions for removal of signs without compensation, were lawfully erected under State law, requiring just compensation for damages upon removal

After the passage of the Federal Act, the Highway Commissioner moved rapidly to impose limitations upon outdoor advertising. His reasons are not fully stated in the record, but perhaps he was concerned over the ultimate cost of removal of signs which might be lawfully erected before the effective date of the Federal Act. At any rate, he took action to restrict the construction of new outdoor advertising signs which might be erected along interstate highways. He first obtained an opinion of the Attorney General that he had the authority to issue rules on the subject, and he then promulgated "Rule and Regulation Governing Control of Billboard Advertising Along Interstate and Primary Highways," dated December 2, 1965, and filed in the office of the Attorney General on December 3, 1965. The rule became effective on the latter date, pursuant to Section 28-32-03, N.D.C.C., a part of the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C. The Commissioner's rule provided:

"The establishment of billboard advertising along interstate and primary highways in the State of North Dakota shall be prohibited within 660 feet from the nearest edge of the right of way unless permission to so establish billboard advertising within 660 feet from the nearest edge of the right of way along interstate and primary highways is requested in writing and the permission requested is granted in writing by the North Dakota State Highway Commissioner."

Section 28-32-03, N.D.C.C., provides that rules and regulations promulgated and adopted by an administrative agency, when filed with the Attorney General, "shall have the force and effect of law until amended or repealed by the agency or until the same is declared invalid by a final court decision." Thus there is a presumption of validity of a rule or regulation of an administrative agency, comparable to the presumption of validity of a statute.

Any person adversely affected by the Commissioner's rule could have petitioned for reconsideration under Section 28-32-04, N.D.C.C.

Newman did not seek a rehearing, nor did it bring any proceeding by way of appeal or declaratory judgment or otherwise. Instead, it made application for permits to the Commissioner, and accepted the benefits of such permits by constructing signs. By so doing, it estopped itself from attacking the constitutionality of the rule and regulation of the Commissioner. We have held repeatedly that one who seeks and obtains the advantage of a statute is estopped from challenging the constitutionality of that statute. The rule goes back at least to 1893, where we said in *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Nester*, 3 N.D. 480, 483, 57 N.W. 510, 512 (1893):

"He went before the commissioners, and sought the benefit of this law. Subsequently, he voluntarily chose to pursue a remedy provided by the statute in preference to a common-law remedy that was open to him. By these acts he has waived any benefit of the constitutional provision. Such should be the law in reason, and such is the law upon authority. Cooley, Const. Lim. 216; End. Interp. St. § 537, and cases there cited."

In *State v. Mundy*, 53 N.D. 249, 255, 205 N.W. 684, 686 (1925), we said:

"Both on principle and authority one who voluntarily enters into an engagement for the purpose of enjoying certain benefits and advantages and by virtue thereof reaps these advantages is precluded from denying the validity of his engagement or undertaking."

In *Cofman v. Ousterhous*, 40 N.D. 390, 402, 168 N.W. 826, 829, 18 A.L.R. 219 (1918), we said:

"It is clear, indeed, that a person who obtains a license under a law, and seeks for a time to enjoy the benefits thereof, cannot afterwards question the constitutionality of the act when the license is sought to be revoked."

And see *Ethan v. North Dakota Workmen's Compensation Bureau*, 62 N.D. 394, 244 N.W. 32 (1932).

We therefore hold that the construction of signs within the terms of the Commissioner's rule during the period in question was subject to that rule and to the terms of permits issued under that rule.

If a permit issued by the Commissioner during the period in question contains an undertaking to waive

any right to compensation upon removal of the sign, such a provision would be valid and binding. If no such waiver is contained in the permit, the sign constructed under the permit would be "lawfully erected" under State law and the owner of the sign would be entitled to compensation upon removal to the extent permitted by the subsequent legislation, to be discussed later in this opinion.

On April 28, 1966, the Commissioner issued an "interim policy" which allowed the erection of new signs under certain circumstances after obtaining a permit. The policy included this language:

> "The permittee must agree to save the State harmless from any costs or liabilities arising from the removal of the sign and cancellation of the lease between sign owner and the land owner."

It provided that permits would be granted for a term extending to January 1, 1970, unless sooner invalidated by agreement between the Commissioner and the Secretary or by standards adopted by the Secretary, at which time the sign must be removed by the permittee unless extended by the Commissioner.

It also provided that the location of signs within municipalities was to be in accordance with city zoning regulations, and outside municipal limits, the size, spacing, and location of signs would be in accordance with a proposal submitted by the Outdoor Advertising Association of North Dakota at a hearing held on March 1, 1966.

Permits issued under this policy stated, in capital letters:

> "UNDER NO CIRCUMSTANCES WILL THE PERMITTEE BE PAID JUST COMPENSATION FOR THE REMOVAL, CHANGING, ALTERING OR MODIFICATION OF ANY SIGN, DEVICE OR DISPLAY ERECTED BY VIRTUE OF THIS PERMIT AND THE PERMITTEE EXPRESSLY WAIVERS [*sic*] HIS RIGHTS, IF ANY, TO SUCH REDRESS."

This policy was not submitted to the Attorney General for approval. However, we hold that it is within the terms of the prior rule of December 3, 1965, which was approved by the Attorney General, which required a written request for permission to construct outdoor advertising signs and written permission from the Commissioner to do so. The authority to impose terms in giving a permit is necessarily implied from the right to grant the permit.

On February 28, 1967, the North Dakota Highway Beautification Act was signed by the Governor and the Highway Corridor Board was created. Section 24-1709 provides that the Board "shall enact suitable regulations to carry out the purposes" of the statute. The regulations are to be made in accordance with a comprehensive plan and design for several purposes, including the placement of signs within 660 feet of the right-of-way and adoption of standards relating to size, lighting, and spacing, the issuance of permits for signs within 660 feet of the right-of-way and visible from the highway, the establishment of fee schedules for permits and prescribing of regulations for issuance thereof by the Commissioner, and determination of unzoned commercial or industrial areas by agreement between the Board and the Secretary pursuant to 23 U.S.C. 131.

The first action by the Board was the adoption of an interim policy on March 21, 1967. This was reasonably expeditious action. During the short interval between the adoption of the North Dakota Act and the adoption of the interim policy by the Board, the language of the Commissioner's interim policy governed, except to the extent, if any, that it was inconsistent with the Act.

The Board's interim policy adopted a so-called "ring" theory advocated by the billboard industry. It allowed signs near cities, the distance from each city varying according to the size of the city, from one-half mile for cities with less than 100 population to three miles for cities over 10,000 population. It provided for size limitations and spacing requirements. The policy also provided:

> "The permittee must agree to save the state harmless from any costs or liabilities arising from the removal of the sign and cancellation of the lease between sign owner and landowner."

Newman applied for and received a substantial number of permits under this policy. Beginning in 1971, its applications for permits were accompanied by written protests as to the limitations of the policy. The protests were rejected.

The Board's interim policy was submitted to the Attorney General for approval under the Administrative Agencies Practice Act, *supra*, and the approval was given on April 6, 1967.

Apparently all parties concerned were unaware of the fact that the North Dakota Highway Beautification Act contains a specific provision making the

Administrative Agencies Practice Act inapplicable except as to appeals, to proceedings under the Highway Beautification Act. The nullification of the other aspects of the Administrative Agencies Practice Act is hidden under the heading "Appeals to district court" of Section 24-17-15, which reads:

> "Any person, or persons, jointly and severally, aggrieved by a decision of the board under this chapter, may appeal therefrom to the district court and to the supreme court in accordance with sections 28-32-15 through 28-32-21, *provided, however, that no other sections in chapter 28-32 shall be applicable to any proceedings of the board."* [Emphasis added.]

The effect of the italicized portion, of course, is to make the Administrative Agencies Practice Act inapplicable to the Highway Beautification Act, except as to appeals. Not surprisingly, this provision was overlooked in the application of the Highway Beautification Act.

The Act contains its own (somewhat inconsistent) provisions for the adoption of rules and regulations. In Section 24-17-10 it provides that rules and regulations "shall be filed with the commissioner and shall have the force and effect of law upon such filing." But later in the Act, in Section 24-17-13, it provides that the Board "may" propose rules or regulations for promulgation and "shall" hold public hearings thereon. Such proposed rules or regulations "shall" be published in the official county newspaper of each county in which land may be affected by the rule or regulation. Section 24-17-14 then provides that the Board "may adopt" the proposed rules or regulations with such changes as it

deems advisable. Upon adoption of the rule or regulation, the Board "shall" cause it to be published for three weeks in the official newspaper of each affected county, and proof of publication "shall" be filed in the office of the county auditor and with the Highway Commissioner, and "thereupon the resolutions, rules or regulations shall take effect." The conflict between rules and regulations which may be adopted without notice and are effective upon filing with the Commissioner, and rules and regulations which are adopted only after hearing and publication and filing with the Commissioner and the county auditor, is apparent. Since the provisions are in hopeless conflict, we hold that the more specific [Sections 24-17-13 and 24-17-14] govern the more general [Section 24-17-10].

In any case, the internal requirements of the statute were not complied with, no doubt because of the assumption that the Administrative Agencies Practice Act governed. The result of the failure to follow the internal requirements of the Highway Beautification Act is that the rules and regulations were not properly adopted.

The Board had a hearing on rules and regulations on January 24, 1968, but no rules and regulations were adopted by the Board until August 1, 1973, and the rules adopted then were written so as to conform to an agreement between the Board and the Secretary of Transportation on January 19, 1972.

However, Newman is in no position to raise the question of the validity of the regulations because it sought and accepted the benefits of the permit system which it now attacks. This it cannot do, for reasons

stated previously in this opinion. So far as it is concerned, the rules and regulations were binding.

Issue 3:

Whether Newman, whose president was a member of the Board during the period in controversy, is estopped from relying upon inaction of the Board in promulgating rules and regulations

The district court, in its memorandum opinion, concluded that "If there was unreasonable lapse of time, or the Board was otherwise remiss in failing to adopt regulations, Mr. Newman, as a Board member, must share that responsibility" and therefore Newman is "estopped from asserting a right to just compensation for nonconforming signs erected after January 19, 1972." In light of our holding above, that Newman waived its right to question the validity of the Board's regulations and is bound by them due to its acceptance of benefits thereunder, it is unnecessary for us to determine this issue.

Issue 4:

Whether Newman is entitled to compensation for damages resulting from the removal of signs which existed prior to the effective date of the Act which were expanded, reconstructed, or substantially altered later

The district court made no ruling regarding this issue, presumably because it found the effective date of

the Act to be January 19, 1972, and considered signs which had been expanded, reconstructed, or substantially altered prior to that date as being legally erected.

Under Section 24-17-05, Newman is entitled to compensation for damages resulting from the removal of signs which were lawfully erected but became nonconforming due to the passage of the Act or the promulgation of regulations thereunder. Section 24-17-04 provides sign owners a five-year amortization period during which a nonconforming sign is allowed to remain even though not in compliance with the Act or regulations. The question is whether compensation must be paid to a sign owner who expands, reconstructs or substantially alters a nonconforming sign during this five-year period.

Section 24-17-05 directed the Commissioner—

> ". . . to acquire by purchase, gift, condemnation or exchange, signs lawfully erected which do not conform to this Act or the regulations established by the board. Owners of advertising structures, signs, displays or devices acquired by the commissioner pursuant to this section, and the owners of the land upon which such displays are located shall be paid just compensation for the *reasonable damages, if any,* suffered by the reason of such removal before the end of the fifth year after such displays become nonconforming.
>
> "Despite any contrary provision of this Act, no sign shall be required to be removed unless at the time of removal there are sufficient funds, from whatever source, appropriated and available to this state with which to pay the just compensation required under this section, and unless at such time the federal funds allotted to this state under title 23, United States Code, section 131 or section 319

> have been appropriated and are available to this state; provided, however, that signs erected after October 22, 1965, and prior to December 3, 1965, which are required to be removed to be in conformity with title 23, United States Code, section 131 of the rules and regulations promulgated thereunder the commissioner may acquire such signs in the manner provided herein and expend state highway funds for their acquisition." [Emphasis added.]

The Corridor Board has the power—

> "b. To regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures; . . ." Sec. 24-17-09, subsec. 2, N.D.C.C.

Owners of signs subject to the terms of the Board's Outdoor Advertising Permit waived any right to compensation "FOR THE REMOVAL, CHANGING, ALTERING OR MODIFICATION OF ANY SIGN, DEVICE OR DISPLAY ERECTED BY VIRTURE OF" the permit.

Inclusion of a five-year amortization period within the statutory scheme indicates that the Legislature intended to allow the sign owner to recoup at least part of his investment in the sign prior to requiring its removal while at the same time reducing the compensation due from the State upon removal of the sign.

Expansion or enlargement of nonconforming uses generally is not allowed. The Michigan Court of Appeals, in *White Lake Township v. Lustig*, 10 Mich.App. 665, 674, 160 N.W.2d 353, 357 (1968), stated:

". . . it is the law of Michigan that the constitution of a nonconforming use must be substantially of the same size and same essential nature as the use existing at the time of passage of a valid zone ordinance."

See also *Dearden v. City of Detroit*, 70 Mich.App. 163, ____ , 245 N.W.2d 700, 703 (1976).

The Iowa Supreme Court is in accord:

". . . . plaintiff argued this construction is not an enlargement or extension because it does not add to the life of the building. It is true the effect on longevity of a nonconforming building is sometimes material in determining whether a work is a permissible repair or an impermissible extension. [Citation.] But plaintiff is wrong in suggesting there can be no extension or enlargement of the use unless the longevity of the building is increased. Other factors can increase the use." *Stan Moore Motors, Inc. v. Polk County Bd. of Adjust.*, 209 N.W.2d 50, 52 (Iowa 1973).

To allow more than basic repair and maintenance of a nonconforming sign would defeat the purpose of the statute. And to construe the statute so as to require the State to compensate a sign owner according to the value of the sign after it has been expanded, reconstructed, or substantially altered would not constitute the payment of "reasonable damages."

Because the district court did not deal with this issue, it is necessary to remand the case for a determination of which signs were expanded, reconstructed, substantially altered, or abandoned in such manner as to limit compensation upon removal to the value of the sign before it had been expanded, reconstructed, or substantially altered or to eliminate the requirement of

payment of compensation upon removal in the case of abandoned signs.

Issue 5:

Whether signs erected without a permit upon property, the advertising rights on which had been previously purchased by the Highway Department, are signs lawfully erected under State law, requiring just compensation upon removal

The Commissioner argues that the Highway Department, prior to 1965, had purchased advertising rights under various State statutes where Federal fund incentives were provided to States making such acquisitions. Newman's argument is premised in part, on the contention that the effective date of statutory control of outdoor advertising in North Dakota was January 19, 1972. In addition, Newman argues that the Board, pursuant to Section 24-17-09, subsection 3, determined that the advertising rights previously acquired by the Highway Department were not necessary. Section 24-17-09, subsection 3, states:

"3. The board shall review all rights now acquired by the state of North Dakota for the use and benefit of the state highway department pertaining to the right and control over the erection, location or maintenance of billboards, signs or any form of advertising within six hundred and sixty feet [201.17 meters] from the nearest edge of the right of way of the state highway system, and should the board determine that such rights previous-

> ly acquired are not necessary to accomplish the purpose of this chapter then such rights shall be vacated pursuant to section 24-01-28."

The district court did not deal with this issue.

It is clear that if the Highway Department properly acquired advertising rights which legally precluded the landowner from leasing advertising rights to Newman, and the Highway Department's advertising rights were not "vacated" by the Board pursuant to Section 24-17-09, subsection 3, then signs erected by Newman upon such property were not lawfully erected and Newman is not entitled to compensation. If, however, the advertising rights acquired by the Highway Department were not such as to legally preclude the landowner from entering into a lease agreement with Newman for advertising rights or if the Board properly "vacated" the advertising rights held by the Highway Department prior to the erection of the sign, then the sign would be lawfully erected and subject to the payment of just compensation upon removal.

We find it necessary to remand this issue to the district court for disposition consistent with this opinion.

Issue 6:

Whether Chapter 24-17, N.D.C.C., is unconstitutional because it permits the taking of private property for public use without payment of just compensation

The characterization of the State's action as a noncompensable regulation under the police power as opposed to a compensable taking under the power of

eminent domain is not susceptible to any easy formulation, but, rather, often turns on differences of degree. *Goldblatt v. Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). Both involve some curtailment of private property rights.

In the past, payment of just compensation for a "taking" was required only when there was an actual physical taking or when the Government asserted a proprietary interest for itself in the owner's property. *Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887). More recently, the term "taking" has been held to include restrictions on the use of property which deprive the owner of all or substantially all of the beneficial use of his property. *Penna. Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); *Armstrong v. United States,* 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960).

As the United States Supreme Court has said, ". . . the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation." *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228, 1236 (1958). However, ". . . the form of regulation [can] be so onerous as to constitute a taking which constitutionally requires compensation." *Goldblatt v. Hempstead, supra,* 369 U.S. at 594, 82 S.Ct. at 990, 8 L.Ed.2d at 133.

It has generally been held that a reasonable restriction of the use of property pursuant to a State's police power does not constitute a taking of private property for public use requiring payment of just compensation so long as the regulation is reasonably

related to a proper purpose and does not unreasonably deprive the property owner of all or substantially all beneficial use of his property. *Modjeska Sign Studios, Inc. v. Berle,* 43 N.Y.2d 468, 373 N.E.2d 255 (C.A.N.Y. 1977); *Eldridge v. City of Palo Alto,* 57 Cal.App.3d 613, 129 Cal.Rptr. 575 (1976).

The question, therefore, is whether Chapter 24-17 is reasonably related to a proper purpose under the State's police power; and, if so, does it nevertheless deprive the owner of all or substantially all of the beneficial use of his property, thus requiring payment of just compensation?

Newman argues that Chapter 24-17, N.D.C.C., is an unconstitutional exercise of the police power, in that the Legislature acted unreasonably, arbitrarily, and without a proper purpose. It is a well-established rule of law that an enactment of the Legislature is presumed to be valid, and the presumption is conclusive unless clearly shown to be in contravention of the State or Federal Constitution. *Southern Valley Grain Dealers Assn. v. Board of County Commissioners of Richland County,* 257 N.W.2d 425 (N.D. 1977); *Gableman v. Hjelle,* 224 N.W.2d 379 (N.D. 1974); *Horst v. Guy,* 219 N.W.2d 153 (N.D. 1974). Newman therefore has the burden of coming forward with evidence showing why the enactment is constitutionally defective.

The test for determining whether a legislative enactment constitutes an invalid exercise of the police power is stated in *Soderfelt v. City of Drayton,* 59 N.W.2d 502, 507 (N.D. 1953):

> "Statutory enactments and municipal ordinances having for their purpose the protection of the public health, safety, morals and public welfare are founded upon the police power inherent in the state. In passing upon the constitutionality of such statutes or ordinances the courts will not declare them unconstitutional and thus substitute their judgment for that of the legislative body charged with the primary duty and responsibility of determining the question where the question is fairly debatable, that is, unless the statute or ordinances are clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals or public welfare."

See also *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Newman argues that the purpose of the chapter was to avoid the penalty imposed by the Federal law in the event North Dakota did not comply, and that such a purpose is an arbitrary reason for enacting such a law. He argues that the Legislature did not declare a nuisance, did not find any evidence, and did not declare any safety or aesthetic reasons for enacting the law, but instead merely declared that the public interest was at stake.

The preamble to the Act explains the purpose of the enactment as follows:

> "Declaring public policy with regard to the regulation of outdoor advertising and the restoration, preservation and enhancement of scenic beauty; . . ." 1967 S.L., Chap. 291.

The declaration of policy contained in Section 24-17-01, N.D.C.C., states that it is

> ". . . in the public interest reasonably to regulate advertising devices along the highways hereinafter specified while, at the same time, recognizing that

> both the convenience of travel and the interests of the economy as a whole require a reasonable freedom to advertise. . . . It is further declared to be in the public interest to review all rights now acquired by the state of North Dakota for the use and benefit of the state highway department pertaining to the right and control over the erection, location or maintenance of billboards, signs or any form of advertising adjacent to the state highway system, to determine and designate such areas adjacent to the state highway system as are necessary for the restoration, preservation and enhancement of scenic beauty . . ."

In addition, Section 24-17-09, N.D.C.C., which sets forth the duties and powers of the Board, specifies that the Board's function includes establishing zoning districts and issuing regulations:

> "1. For the purpose of promoting the public health, safety, welfare, convenience, enjoyment and recreational value of the public highways, to protect the public investment in the state highway system and to preserve the natural beauty of lands bordering on the state highway system, . . ."

Thus the Legislature has clearly identified the purposes it intended to achieve by adopting Chapter 24-17, which include restoring, enhancing, and preserving scenic beauty along the Interstate and primary highway systems of the State; promoting the safety and convenience of those traveling on the highways; protecting the public investment in the State highway system; and promoting the enjoyment and recreational value of the State highways. We conclude that these purposes are within the proper scope of the police

power of a State. Many courts which have decided cases arising under similar statutes are in agreement. See, e.g., *Inhabitants, Town of Boothbay v. National Adv. Co.*, 347 A.2d 419 (Me. 1975); *Markham Advertising Company v. State*, 73 Wash.2d 405, 439 P.2d 248 (1968), *appeal dismissed* 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512 (1969); *Cromwell v. Ferrier*, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967).

Courts which have dealt with the regulation of outdoor advertising signs have often quoted the language of *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27, 38 (1954), as support for the inclusion of such regulation within the concept of the public welfare:

> "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

Some courts have recognized that aesthetic considerations alone may form the basis for a valid exercise of the police power. See *State v. Diamond Motors, Inc.*, 50 Hawaii 33, 429 P.2d 825 (1967); *Oregon City v. Hartke*, 240 Ore. 35, 400 P.2d 255 (1965); *Jasper v. Commonwealth*, 375 S.W.2d 709 (Ky. 1964); *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963); *Westfield Motor Sales Co. v. Town of Westfield*, 129 N.J.Super. 528, 324 A.2d 113 (1974). We need not decide whether aesthetic considerations alone justify this regulation because the regulation is based upon a combination of purposes which we find to be within the police power.

In addition to preserving scenic beauty, the Legislature also recognized safety as a purpose of the chapter. Although some courts have questioned the validity of the assertion that outdoor advertising signs have a detrimental effect on traffic safety, we have been provided with no evidence to indicate that such a relationship does not exist. We agree with the statement of the New York appellate court in *Whitmier & Ferris Company v. State,* 20 N.Y.2d 413, 284 N.Y.S.2d 313, 315, 230 N.E.2d 904, 905 (1967):

> "If people did not look at the signs, advertisers would not find it profitable to put them there. It was within the competence of the Legislature to determine that the safety of the traveling public is endangered by this distraction of the attention of drivers of automobiles under these circumstances. Exercise of the police power over subjects whose relationship to the public safety is honestly debatable cannot be held unconstitutional by the courts [Citation]."

We also conclude that Chapter 24-17, N.D.C.C., does not deprive Newman of all or substantially all of the beneficial use of its property.

The Act does provide compensation for lawfully erected signs which, due to the enactment of the statute or the regulations thereunder, become nonconforming. Sec. 27-17-05, N.D.C.C. The North Dakota Act also provides within its statutory scheme an amortization period during which a sign owner is allowed to maintain his sign without its being subject to removal. This type of provision is common in many States and has been upheld against constitutional attack. See, e.g., *E.B. Elliott Adv. Co. v. Metropolitan Dade County,*

425 F.2d 1141 (5th Cir. 1970); *National Advertising Co. v. County of Monterey,* 1 Cal.3d 875, 83 Cal.Rptr. 577, 464 P.2d 33 (1970), *appeal dismissed* 398 U.S. 946, 90 S.Ct. 1869, 26 L.Ed.2d 286 (1970); *Webster Outdoor Advertising Co. v. City of Miami,* 256 So.2d 556 (Fla.App. 1972); *Art Neon Co. v. City and County of Denver,* 488 F.2d 118 (10th Cir. 1973), *cert. denied* 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 236 (1974); *Donnelly Advertising Corp. v. City of Baltimore,* 279 Md. 660, 370 A.2d 1127 (1977); *Naegle Outdoor Adv. Co. v. Village of Minnetonka,* 281 Minn. 492, 162 N.W.2d 206 (1968).

Amortization has been found to be a constitutionally acceptable way of compromising the competing interests of private property owners and the public. "Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements." *City of Los Angeles v. Gage,* 127 Cal.App.2d 442, 460, 274 P.2d 34, 44 (1954).

Newman argues that it is being deprived of the right to engage in a lawful business; however, it is well settled that even a legitimate business may be regulated in the public interest. *Johnson v. Elkin,* 263 N.W.2d 123 (N.D. 1978); *Breard v. Alexandria,* 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951).

The chapter does nothing more than regulate one particular future use of property while leaving available the option of erecting and maintaining signs within the confines of the statute. We cannot say, based on the record before us, that the negative restriction placed upon the landowner and thus on his lessee has the effect of depriving Newman of all or substantially all of the beneficial use of his property.

Issue 6-b:

Whether Chapter 24-17, N.D.C.C., is unconstitutional because it creates an unconstitutional classification

Newman contends that the chapter unconstitutionally discriminates between off-premise and on-premise signs. In challenging the constitutionality of a statute on this basis, Newman must bear the burden of establishing that the classification bears no reasonable relation to a conceivable legislative purpose. *Snyder's Drug Stores, Inc. v. North Dakota State Board of Pharmacy,* 219 N.W.2d 140 (N.D. 1974).

This court, in *Signal Oil and Gas Co. v. Williams County,* 206 N.W.2d 75, 83 (N.D. 1973), recognized that the Legislature has broad discretion in making classifications, and enunciated the test to be applied in determining whether a particular classification is unconstitutional:

> "It is . . . well established that a classification although discriminatory is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. [Citations omitted.] Furthermore, a court need not know the special reasons, motives, or policies of a State legislature in adopting a particular classification, so long as the policy is one within the power of the legislature to pursue, and so long as the classification bears a reasonable relation to those reasons, motives, or policies."

Several courts have had occasion to decide this precise issue and have upheld the differential treatment of on-premise and off-premise advertising signs. In an

opinion written by Mr. Justice William Brennan (now of the United States Supreme Court), the New Jersey Supreme Court reasoned:

> "The business sign is in actuality a part of the business itself, just as the structure housing the business is a part of it, and the authority to conduct the business in a district carries with it the right to maintain a business sign on the premises subject to reasonable regulation in that regard . . . Plaintiff's placements of its advertising signs, on the other hand, are made pursuant to the conduct of the business of outdoor advertising itself, and in effect what the ordinance provides is that this business shall not to that extent be allowed in the borough. It has long been settled that the unique nature of outdoor advertising and the nuisances fostered by billboards and similar outdoor structures located by persons in the business of outdoor advertising, justify the separate classification of such structures for the purposes of governmental regulation and restriction." *United Advertising Corp. v. Borough of Raritan,* 11 N.J. 144, 150, 93 A.2d 362, 365 (1952).

The United States Supreme Court also has given the distinction its approval in dictum found in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). It dismissed an appeal in *Markham Advertising Co. v. Washington, supra* [73 Wash.2d 405, 439 P.2d 248 (1968)], 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512 (1969), for want of a substantial Federal question. See also *Inhabitants, Town of Boothbay v. National Adv. Co., supra,* and *Landau Advertising Co. v. Zoning Board of Adjustment,* 387 Pa. 554, 128 A.2d 559 (1957).

The above cases recognize that on-premise signs serve the special purpose of identifying the services or products found at the particular site and are a necessary part of conducting a business. On-premise signs are subject to reasonable regulation; however, they need not be regulated to the same extent or in the same manner as off-premise signs. We find that it is not arbitrary or unreasonable to provide different regulations for off-premise and on-premise signs.

Issue 6-c:

Whether Chapter 24-17, N.D.C.C., is unconstitutional because it violates due process of law, contrary to Section 13 of the Constitution of North Dakota and the Fourteenth Amendment to the Constitution of the United States

Newman argues that Section 24-17-11, N.D.C.C., is confiscatory and unconstitutional because it provides for no notice of hearing or opportunity for hearing.

Section 24-17-11 provides:

> "Any advertising sign which violates the provisions of this chapter or the regulations adopted by the board is hereby declared to be illegal. The commissioner shall give thirty days' notice, by certified mail, to the owner thereof to remove the same if it is a prohibited sign, or cause it to conform to regulations promulgated by the board if it is an authorized sign. If the owner fails to act within thirty days as required in the notice, or if the commissioner is unable to ascertain the ownership of the sign, then such sign shall be deemed abandoned and the commissioner may remove such sign, and to this end he may enter upon private property for the purpose of removing such sign without liability for his actions."

The statute does not authorize summary seizure of private property, as contended by Newman, but, rather, authorizes the Commissioner to remove illegal signs only after 30 days' notice. The statute also provides the sign owner an opportunity to make those signs which are authorized under the chapter but do not conform to the standards set forth by statute or regulation, conforming signs.

Section 24-17-15, N.D.C.C., sets forth the procedure to be followed by a person aggrieved by a decision that a sign is illegal and must be removed. That procedure is by appeal pursuant to Sections 28-32-15 through 28-32-21. The 30-day-notice period allows sufficient time for the sign owner to submit his objections to the determination of illegality and to obtain a hearing, if so desired, before the district court prior to the removal of the sign. The sign owner might also seek a temporary restraining order or injunction to prevent removal pending appeal to the district court. We find that this procedure meets the constitutional requirement of procedural due process.

Issue 6-d:

Whether Chapter 24-17 violates the First Amendment guarantee of freedom of speech

Newman relies on two recent United States Supreme Court cases for the proposition that commercial speech is fully protected under the First Amendment:

In *Bigelow v. Virginia*, 421 U.S. 809, 826, 95 S.Ct. 2222, 2234-2235, 44 L.Ed.2d 600, 614 (1975), the Court held that commercial speech is not stripped of all First Amendment protection; however, "Advertising, like all

public expression, may be subject to reasonable regulation that serves a legitimate public interest. [Citations omitted.] To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged." The holding in *Bigelow* limited First Amendment protection of commercial messages to those which are of "public interest."

In *Va. St. Bd. of Pharm. v. Va. Cit. Cons. Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), the Court clarified the law regarding First Amendment protection of commercial speech by holding that it is not limited to speech of "public interest," but extends to advertising of a purely commercial nature. The Court did not, as argued by Newman, employ a strict scrutiny test in determining the question, but, rather, analyzed the case on "close inspection." It did not require the State to show a compelling State interest in justifying its action, but, instead, employed a balancing test. The Court emphasized that some regulation of commercial speech is permissible. It mentioned prohibitions not before the Court in that case which were not foreclosed by restrictions on the time, place, and manner of the commercial speech. The Court stated:

> "We have often approved restrictions of that kind [time, place, and manner restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." 425 U.S. at 771, 96 S.Ct. at 1830, 48 L.Ed.2d at 363-364.

The Court concluded that the Virginia statute exceeded the bounds of reasonable regulation by singling out speech of a particular content (drug prices) and preventing its dissemination completely.

In the instant case, the statute does not purport to regulate speech on the basis of its content or completely prevent the dissemination of the same information by alternative means. Rather, the statute merely provides restrictions on the place and manner of erection of the outdoor advertising signs. Compare *Linmark Assoc., Inc. v. Township of Willingboro,* 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977).

The Supreme Court in *Va. St. Bd. of Pharm.* compared several cases which dealt with time, place, and manner restrictions on speech protected by the First Amendment. In *Grayned v. City of Rockford,* 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222, 232 (1972), a case involving picketing at a school, the Court recognized that

> "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."

In *Kovacs v. Cooper,* 336 U.S. 77, 87, 69 S.Ct. 448, 453, 93 L.Ed. 513, 522 (1949), the Court held that regulation of sound trucks driving in a municipality was reasonable:

> "We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts or public interest, amplified to a loud and raucous volume, from the public ways of municipalities.

> On the business streets . . . such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social, or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets."

In *Lehman v. City of Shaker Heights,* 418 U.S. 298, 302-303, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770, 777 (1974), a case involving regulation of political placards on a public rapid-transit system, the Court stated:

> "Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question."

The nature of the Interstate and primary highways in the State as public thoroughfares which carry a large volume of rapidly moving traffic through the many scenic areas of the State therefore is important in determining whether the regulations in the North Dakota statute are reasonable.

We must also consider the manner of expression. While billboard advertising does provide the traveling public with valuable information, it also has been recognized to be an intrusion on the privacy of those individuals who use the highways. This intrusive characteristic of outdoor advertising signs was emphasized by Justice Brandeis in *Packer Corporation v. Utah,* 285 U.S. 105, 110, 52 S.Ct. 273, 275, 76 L.Ed. 643, 647 (1932): "The radio can be turned off, but not so the billboard or street car placard." See also *General Outdoor Advertising Co. v. Department of Public Works,* 289 Mass. 149, 193 N.E. 799 (1935); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Bigelow v. Virginia, supra; Lehman v. City of Shaker Heights, supra;* and *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.,* 339 N.E.2d 709 (Mass. 1975).

Using the principles of the foregoing cases as our guide, we must balance the interests of the State against those of Newman. The State has an interest in providing a safe place for the users of the State highways. Although no empirical evidence was presented to either support or refute the relationship between billboards and traffic safety, we are not prepared to say that such a relationship does not exist, especially when the Legislature has found that it does. The nature of highway driving is such that the eyes of the driver may be diverted, sometimes subconsciously, from the road to the billboard. It is therefore reasonable to assume that the existence of highway billboards could have a detrimental effect on traffic safety.

The State also has an interest in protecting the privacy of those individuals who use the highways. As discussed above, several courts have recognized that highway users are, to some extent, a captive audience for those who wish to compete for their attention.

The State also has a legitimate interest in protecting, preserving, and enhancing the aesthetic quality of its land, as we mentioned above.

Newman has not presented any evidence or argument as to harm which will be occasioned by those who enter into its advertising contracts. In any event, the effect of such regulation is questionable in light of the varied network of communication available for the dissemination of such advertising messages, one such alternative means being the continuation of billboard advertising within the confines of the statutes.

The effect of the regulation on the public also is not subject to easy measurement since the same information which is presently conveyed on billboards ordinarily can be made available by the use of alternative means.

The interests of Newman are minimal in comparison with the public interest involved and the effect that the regulations have on the public and the businesses contracting for advertising space is not so substantial as to outweigh the State's interest in providing a safe and visually pleasing environment.

In applying the criteria set forth in *Va. St. Bd. of Pharm., supra,* we find that Chapter 24-17, N.D.C.C., provides restrictions on the place and manner of outdoor advertising signs, which restrictions (1) are justified without reference to the content of the regulated speech, (2) serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the same information.

Issue 6-e:

Whether Chapter 24-17 contains an unconstitutional delegation of power to legislate to a Federal administrator

The Commissioner raised this issue in challenging the judgment of the district court, that the effective date of the North Dakota statutory regulation was suspended until January 19, 1972, the date the agreement between North Dakota and the Federal administrator was executed. Due to our finding that the effective date of the statutory regulation is January 1, 1968, this issue has been rendered moot.

The case is remanded to the district court for further proceedings consistent with this opinion.

/s/ Robert Vogel
/s/ P. M. Sand
/s/ Wm. Paulson
/s/ Larry M. Hatch
/s/ Ralph J. Erickstad
D.J.

HATCH, D.J., sitting for PEDERSON, J., disqualified.

APPENDIX B.

ORDER OF THE SUPREME COURT OF NORTH DAKOTA

DENYING PETITION FOR REHEARING

File No. 9394

STATE OF NORTH DAKOTA, } ss.
In the Supreme Court }

Appeal from the District Court of Cass County.

Newman Signs, Inc., a North Dakota Corporation,

Plaintiff, Appellee and Cross-Appellant

v.

Walter Hjelle, as North Dakota State Highway Commissioner, and North Dakota Highway Corridor Board,

Defendants, Appellants and Cross-Appellees

This action coming on to be heard at the February A.D. 1978 term of this Court at the Supreme Court room, in the City of Bismarck, State of North Dakota;

Present The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Wm. L. Paulson, the Honorable Robert Vogel, the Honorable Paul M. Sand, the Honorable Larry M. Hatch, District Judge, Justices; and a petition for a rehearing upon the appeal herein having been filed by Mr. Edmund G. Vinje, II, for the appellee and cross-appellant and the court having advised thereon, it is now here considered, ordered and adjudged, that the petition be and the same is hereby DENIED.

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this court.

Dated August 3, 1978

BY THE COURT,

/s/ Ralph J. Erickstad
Chief Justice

Attest:

/s/ Catherine Fox
Deputy Clerk

STATE OF NORTH DAKOTA,
IN THE SUPREME COURT,

The petition for a rehearing upon the appeal in the above entitled action is hereby DENIED.

/s/ Robert Vogel
/s/ Wm. L. Paulson
/s/ P. M. Sand
/s/ Larry M. Hatch
/s/ Ralph J. Erickstad

Judges Supreme Court,
State of North Dakota

File No. 9394

IN THE SUPREME COURT
State of North Dakota

Newman Signs, Inc.

Plaintiff, Appellee and Cross-Appellant

vs.

Hjelle, et al.,

Defendants, Appellants and Cross-Appellees

ORDER ON PETITION FOR REHEARING

Filed in Court this 3rd day of August, 1978

/s/ Catherine Fox

Deputy Clerk.

Remittitur sent down

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APPENDIX C.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT OF THE DISTRICT COURT OF NORTH DAKOTA, FIRST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF CASS	FIRST JUDICIAL DISTRICT
Newman Signs, Inc., a North Dakota Corporation, *Plaintiff,* vs. Walter R. Hjelle, as North Dakota State Highway Commissioner, and the North Dakota Highway Corridor Board, *Defendants.*	**Findings of Fact, Conclusions of Law and Order for Judgment (First Five Causes of Action)**

The first five causes of action of the above entitled action having been severed for the purposes of trial and having come on regularly for trial before the Honor-

able Ralph B. Maxwell, Judge of the District Court, First Judicial District, and no jury having been demanded and this case having been heard without a jury by this Court commencing August 17, 1976 and ending August 26, 1976, and the Plaintiff having presented its evidence a d having thereupon rested and the Defendants having presented their evidence and having rested, and the Court, having heard the evidence and having considered all of the pleadings, papers and files herein, now makes the following:

FINDINGS OF FACT

1. On October 22, 1965 the Federal Highway Beautification Act (23 USC 131) became law. Its main purpose was to provide for the effective control of outdoor advertising in areas within 660 feet of the nearest edge of the right-of-way of the Interstate Highway system and the primary highway system, and to virtually eliminate by removal all advertising structures in all but commercial and industrial areas, zoned or unzoned.

2. To insure the cooperation of the states, the Federal Act provided that any state failing to provide for "effective control" of outdoor advertising on or after January 1, 1968, would have any federal-aid highway funds apportioned to it after that date reduced by 10% of the amounts which would otherwise be apportioned to such state until such time as it provided for effective control. The Act also provided that the Secretary of Commerce (later the Secretary of Transportation when the Department of Transportation was created) whenever he determined it to be in the public

interest, could suspend the application of the penalty provision to a state.

3. The Federal Act also provided that outdoor advertising could be erected and maintained in areas zoned industrial or commercial under state law, or in unzoned commercial or industrial areas as might be determined by agreement between the several states and the Secretary. It also required the agreement between the several states and the Secretary to determine the size, lighting and spacing of outdoor advertising.

4. Upon the enactment of the Federal Highway Beautification Act the North Dakota Highway Commissioner determined that immediate action was necessary. On December 3, 1965 he issued a regulation prohibiting the further erection of highway billboards without his permission. In early April, 1966, he issued an "interim policy of billboard control". The stated purpose of this policy was "to permit reasonable and controlled erection of signs and billboards until standards are promulgated by the Secretary of Commerce". The interim policy provided for a permit system for the erection of new outdoor advertising signs, displays or devices. It also provided that the permitee waive and not "be paid just compensation for the removal, changing, altering or modification of any sign, device or display erected by virtue of "the permit". Thus, through his regulation of December 3, 1965, and the interim policy, the Highway Commissioner was able to control the erection of new billboards during the interim before the North Dakota legislature would have an opportunity to take any action to comply with the Federal Act during its next regular session in 1967.

5. During the 1967 session, the North Dakota legislature enacted Chapter 24-17 of the North Dakota Century Code (the North Dakota Highway Beautification Act). This Act became law February 28, 1967. Sec. 24-17-01 of this Act makes direct reference to the Federal Highway Beautification Act and the rules and regulations promulgated thereunder. Under the provisions of the North Dakota Act control of billboards was to be vested in a new state board called the Highway Corridor Board. The Highway Corridor Board had its organizational meeting shortly after the Act became law. Harold Newman, president of the Plaintiff corporation, as well as president of the North Dakota Outdoor Advertising Association, was a member of the Highway Corridor Board from the date of its first organization until the board became a Defendant in this lawsuit.

6. With reference to billboard control, the North Dakota Act did two notable things: it allowed specialized grandfather treatment for all existing signs; and it fixed a date after which the erection of new signs was to be regulated. In the original 1967 North Dakota Highway Beautification Act such date was the same as that provided in the Federal Act—January 1, 1968. However, in the 1969 session of the legislature the State Act was amended making such date indefinite. The amended version said with reference to such effective date:

> ". . . January 1, 1968, or any later date established by the Congress of the United States in relation to Title 23, U.S. Code Sec. 131, *or waiver thereof pursuant to said Title 23* . . ." (emphasis added) Section 24-17-03, NDCC

The phrase "or waiver thereof pursuant to . . . . Title 23" alluded to the discretion given federal administrative officials under the Federal Highway Beautification Act to extend the effective date for a state to comply with the federal law.

7. The effective date for state compliance was suspended by federal officials for several years beyond the original January 1, 1968 date. There was a great deal of confusion and indecision on both the federal and state level regarding implementation and enforcement of the Federal Highway Beautification Act. Funds were not made available to carry out the acquisition provisions until after 1969. There were attempts in Congress to repeal or to radically alter the provisions of the Act, including the extension of the date by which the states were to have effective control. This suspension by federal officials constituted a waiver of the January 1, 1968 date pursuant to Title 23, U.S. Code, Sec. 131. Insofar as North Dakota is concerned this waiver lasted until January 19, 1972.

8. On January 6, 1972, the Secretary of Transportation telegraphed an ultimatum to the State Highway Commissioner. He stated that North Dakota must execute its agreement with the federal government by January 20, 1972, or be found in non-compliance. The proposed agreement had previously been presented to the State of North Dakota and contained standards calculated to put the state effectively in control of outdoor advertising. On January 19, 1972, the agreement was signed. That date ended the period of federal waiver and became the activating date of Section 24-17-03, NDCC and the North Dakota Act.

9. The outdoor advertising industry in the State of North Dakota was continuously and effectively controlled commencing December 3, 1965, by the regulation issued by the Highway Commissioner, his interim policy and, subsequent to April 6, 1967, by the interim policy of the Highway Corridor Board. The Highway Corridor Board's interim policy was substantially similar to that of the Highway Commissioner.

10. The North Dakota Highway Commissioner, in conjunction with the outdoor advertising industry of North Dakota, developed a "ring" theory for the erection of new signs after December 3, 1965. This theory was designed to allow signs to be erected in areas which were considered to be unzoned commercial or industrial because of their location on highways near cities. The state, together with the industry, attempted to convince the federal government that this "ring" theory for designating unzoned commercial and industrial areas should be adopted as a provision of the agreement between the state and the Secretary.

11. Although the outdoor advertising industry in North Dakota helped to develop the "ring" theory, there was consistent and vigorous hostility to the provisions of the permit systems which required waiver of any claims for just compensation in the event the signs should later be required to be removed. The Plaintiff did not consent or agree to the waiver of compensation condition, but consistently protested those terms of the permit system. However, the choice was to either build under a permit waiving just compensation in the hope that the signs so erected would continue to be conforming signs, or to not build at all.

12. The agreement of January 19, 1972 did not contain the "ring" theory for designating unzoned commercial and industrial areas. The state was forced to either abandon the "ring" theory and execute the agreement or, due to noncompliance without an agreement, suffer the 10% penalty which would amount to millions of dollars.

13. Both the federal and state highway beautification legislation constituted enabling legislation for the adoption of rules and regulations by administrative agencies. The North Dakota Act provided that the Highway Corridor Board could adopt rules and regulations. The first federal rules and regulations in regard to the acquisition of signs were promulgated on December 12, 1972. The first federal regulations on control of outdoor advertising were promulgated on July 9, 1973. Shortly after the federal rules and regulations on control of outdoor advertising were promulgated, the Highway Corridor Board adopted rules and regulations on August 1, 1973.

14. The petitioner is a duly organized corporation under the laws of the State of North Dakota with its main office located in Jamestown, North Dakota, and as a part of its lawful business petitioner has been engaged in the business of outdoor advertising continuously since prior to 1965; and Plaintiff owns various outdoor advertising structures adjacent to various state and federal highways within the State of North Dakota which fall within the scope of the Federal Highway Beautification Act and the North Dakota Highway Beautification Act.

15. The Plaintiff's only shareholders are Harold Newman and his wife, Mary Newman, and at all times

pertinent hereto Harold Newman was president of the plaintiff corporation.

16. The Plaintiff, in the normal course of its business continuously since prior to 1965, has erected outdoor advertising structures in the State of North Dakota and has repaired, rebuilt, changed or expanded its outdoor advertising structures as it has found necessary and desirable for its business purposes including changing from time to time the copy of its outdoor advertising structures. Subsequent to the adoption of the interim policy by the North Dakota State Highway Commissioner in early 1966, the Plaintiff has erected a number of new signs under the permit system established by the Highway Commissioner and the subsequent permit system of the North Dakota Highway Corridor Board.

17. Plaintiff has received numerous notices from the North Dakota State Highway Commissioner stating that certain of the Plaintiff's outdoor advertising structures are deemed to be illegal and must be removed by the Plaintiff without payment of just compensation. The Highway Commissioner has not conducted any hearing to determine whether or not such structures are legal or illegal either before or after the determination by the Highway Commissioner that said signs are illegal; the Highway Commissioner has through its notice advised Plaintiff that if the signs are not removed within thirty (30) days, the signs shall be deemed abandoned and may be removed by the forces of the State Highway Department.

18. Subsection (g) of Title 23, U.S. Code, Section 131, states that "just compensation shall be paid upon the removal of any outdoor advertising sign, display, or

device lawfully erected under state law. The federal share of such compensation shall be 75 percentum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device . . ."

North Dakota law provides in Section 24-17-05, NDCC, that "the State Highway Commissioner is directed to acquire by purchase, gift, condemnation or exchange, signs lawfully erected which do not conform to this chapter or the regulations established by the Board . . . Just compensation shall be paid upon the removal of any outdoor advertising sign, display or device lawfully erected and maintained under state law . . ."

19. The North Dakota Highway Commissioner, the enforcer of the North Dakota Act pursuant to Section 24-17-12, NDCC, contends that the outdoor advertising structures which Plaintiff has erected pursuant to either of the permit policies were not "lawfully erected". The Commissioner further contends that the signs, even if lawfully erected, may be removed or caused to be removed by the Commissioner without just compensation because the Plaintiff has waived just compensation by the terms of the permit. The Commissioner contends that the Plaintiff knew of the risk before building the signs, that Plaintiff gambled on the federal government accepting the state's "ring" theory and, therefore, should now not be heard to complain if the signs must be removed as nonconforming without compensation. Further, the state contends that signs which were in existence prior to December 3, 1965, or

at the very least, in existence prior to February 28, 1967, are not now compensable if the Plaintiff substantially repaired, rebuilt, changed or expanded the structures. Further, the Commissioner contends that the Plaintiff is estopped from claiming just compensation because the president of the Plaintiff corporation, Harold Newman, served as a member of the five-man Highway Corridor Board from its initial organization and thereafter during all times pertinent to this lawsuit.

20. The Plaintiff recognizes that nonconforming signs are subject to removal. However, Plaintiff contends that the permitted signs were "lawfully erected", and are therefore eligible for just compensation. It contends that any sign erected prior to August 1, 1973, the date the Highway Corridor Board adopted rules and regulations, is a lawfully erected sign and entitled to just compensation if it must now be removed as nonconforming. Plaintiff further claims that the clause in the permit claiming just compensation is not binding because it was unilaterally imposed over objection and is illegal and unconstitutional.

21. Plaintiff further challenges the legality of the state's entire permit system. Plaintiff contends that the Highway Commissioner's attempts as well as those of the Highway Corridor Board to regulate outdoor advertising were without statutory authority and that the state officials improperly restricted and interfered with the Plaintiff's lawful business.

22. The Commissioner has brought no eminent domain proceedings to determine what property of the Plaintiff's is subject to removal and payment of just compensation.

23. This lawsuit is a consolidation of actions, and in its consolidated form is an action by the Plaintiff against the Defendants for injunctive relief temporarily enjoining the Defendants from removing or destroying any of the advertising structures of the Plaintiff, in any manner, until Plaintiff's damages have been ascertained and paid in the manner provided by law or until such time as the issues herein have been resolved; the Plaintiff further requests declaratory relief declaring NDCC 24-17 void and unconstitutional, or, in the alternative, declaring Section 24-17-11 NDCC void and unconstitutional. Further, the Plaintiff has requested the Court declare that the rules and regulations of the North Dakota State Highway Commissioner illegal, beyond the scope of the authority of state and federal law, and unconstitutional, and that the rules and regulations of the North Dakota Highway Corridor Board are illegal and beyond the scope of the law, both federal and state, and unconstitutional. Further, the Plaintiff has petitioned this Court to issue its writ of mandamus directing the respondent North Dakota State Highway Commissioner to comply with Chapters 24-17 and 32-15. NDCC. and directing that eminent domain proceedings be instituted to condemn the Plaintiff's property according to the laws of the State of North Dakota. The sixth cause of action, involving damages, has been severed for separate trial.

From the foregoing Findings of Fact, this Court makes the following:

CONCLUSIONS OF LAW

1.

That this Court has jurisdiction over the parties and of the subject matter.

2.

That until January 19, 1972, the State of North Dakota had no viable statute regulating outdoor advertising signs, displays and devices.

3.

Outdoor advertising structures of the Plaintiff which were erected prior to January 19, 1972 were lawfully erected. All such signs that are deemed to be nonconforming may not be removed without just compensation being paid before removal.

4.

The attempt by the North Dakota State Highway Commissioner to regulate outdoor advertising pursuant to Section 24-04-01, NDCC, was an invalid usurpation of legislation authority and void.

5.

The attempt by the North Dakota Highway Corridor Board to regulate outdoor advertising prior to January 19, 1972 was without force or effect and void because regulation by said Board could have no earlier operative date than the statute itself.

6.

The waiver of compensation provided for in the North Dakota Highway Commissioner's interim policy and the North Dakota Highway Corridor Board's interim policy was void because it constituted an involuntary waiver of constitutional rights.

7.

The Plaintiff should be estopped from asserting any right to just compensation for nonconforming signs erected after January 19, 1972.

8.

The Defendants should be enjoined from removing or destroying any of the advertising structures of Plaintiff until Plaintiff's damages have been ascertained and paid in the manner provided by law.

9.

The Plaintiff is entitled to a writ of mandamus directing the Defendant North Dakota State Highway Commissioner to comply with Chapters 24-17 and 32-15, NDCC and directing said Defendant to institute eminent domain proceedings to condemn the Plaintiff's property as required therein according to the laws of the State of North Dakota, or, in the alternative that the Plaintiff is entitled to proceed on its Sixth Cause of Action herein on the basis of inverse condemnation for just compensation for the taking of its property deemed to be nonconforming pursuant to Chapters 24-17 and 32-15, NDCC.

10.

That Chapter 24-17, NDCC, is not unconstitutional and void on the grounds asserted by the Plaintiff, and that the question of the unconstitutionality of Section 24-17-11, NDCC is rendered moot by the Findings of Fact and Conclusions of Law herein except as otherwise noted herein.

11.

That the Plaintiff is entitled to its costs and disbursements herein.

ORDER FOR JUDGMENT

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 12th day of November, 1976.

BY THE COURT:

/s/

Ralph B. Maxwell,
Judge
First Judicial District

STATE OF NORTH DAKOTA COUNTY OF CASS	IN DISTRICT COURT FIRST JUDICIAL DISTRICT
Newman Signs, Inc., a North Dakota corporation, *Plaintiff* vs. Walter R. Hjelle, as North Dakota State Highway Commissioner and the North Dakota Highway Corridor Board, *Defendants*	**JUDGMENT** **CIVIL NO. 134-46024**

The first five causes of action of the above entitled action having been severed for the purposes of trial and having come on regularly for trial before the Hon. Ralph B. Maxwell, Judge of the District Court, First Judicial District, and no jury having been demanded and this case having been heard without a jury by this Court commencing August 17, 1976 and ending August 26, 1976, and the Plaintiff, represented by its attorneys Herman Weiss and Edmund G. Vinje II of the law firm of Hjellum, Weiss, Nerison, Jukkala & Vinje, having presented its evidence and having thereupon rested, and the Defendant Walter R. Hjelle as North Dakota State Highway Commissioner, represented by its attorney Albert A. Wolf of the law firm of Wheeler, Wolf, Wefald and Peterson, P.C., having presented its evidence and having rested, and the

Defendant North Dakota Highway Corridor Board, represented by its attorney Max D. Rosenberg of the law firm of Conmy, Rosenberg and Lucas, having presented its evidence and having rested, and the Court having heard the evidence and having considered all of the pleadings, papers and files herein, and being fully advised in the premises, and having made and filed its Findings of Fact, Conclusions of Law and Order for Judgment;

NOW THEREFORE, on the motion of Edmund G. Vinje II of the law firm of Hjellum, Weiss, Nerison, Jukkala & Vinje as attorneys for the Plaintiff and in accordance with said Order for Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1.

That this Court has jurisdiction over the parties and of the subject matter.

2.

That until January 19, 1972, the State of North Dakota had no viable statute regulating outdoor advertising signs, displays and devices.

3.

That outdoor advertising structures of the Plaintiff which were erected prior to January 19, 1972 were lawfully erected. All such signs that are deemed to be nonconforming may not be removed without just compensation being paid before removal.

4.

The attempt by the North Dakota State Highway Commissioner to regulate outdoor advertising pursuant to Section 24-04-01, NDCC, was an invalid usurpation of legislative authority and is void.

5.

The attempt by the North Dakota Highway Corridor Board to regulate outdoor advertising prior to January 19, 1972 was without force or effect and is void because regulation by said Board could have no earlier operative date than the statute itself.

6.

The waiver of compensation provided for in the North Dakota Highway Commissioner's interim policy and the North Dakota Highway Corridor Board's interim policy is void because it constituted an involuntary waiver of constitutional rights.

7.

The Plaintiff is estopped from asserting any rights to just compensation for nonconforming signs erected after January 19, 1972.

8.

The Defendants are enjoined from removing or destroying any of the advertising structures of Plaintiff until Plaintiff's damages have been ascertained and paid in the manner provided by law.

9.

The Plaintiff shall have a writ of mandamus directing the Defendant North Dakota State Highway Commissioner to comply with Chapters 24-17 and 32-15, NDCC, and directing said Defendant to institute eminent domain proceedings to condemn the Plaintiff's property as required therein according to the laws of the State of North Dakota, or, in the alternative the Plaintiff shall proceed on its Sixth Cause of Action herein on the basis of inverse condemnation for just compensation for the taking of its property deemed to be nonconforming pursuant to Chapters 24-17 and 32-15, NDCC.

10.

That Chapter 24-17, NDCC, is not unconstitutional and void on the grounds asserted by the Plaintiff, and that the question of the unconstitutionality of Section 24-17-11, NDCC, is rendered moot by the Findings of Fact and Conclusions of Law herein except as otherwise noted herein.

11.

That the Plaintiff is entitled to and is hereby awarded judgment against the Defendants for its costs and disbursements of this action which are hereby taxed in the sum of $3,354.84.

WITNESS the Hon. Ralph B. Maxwell, Judge of the District Court, First Judicial District of the State of North Dakota, and my hand and with the seal of said

Court in and for Cass County, North Dakota, this 10th day of December, 1976.

Ruth E. Hellem
Clerk of the District Court

(SEAL)

First Judicial District,
Cass County, N.D.

APPENDIX D.

MEMORANDUM OPINION OF THE HON. RALPH B. MAXWELL, JUDGE OF THE DISTRICT COURT OF NORTH DAKOTA, FIRST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF CASS

IN DISTRICT COURT

FIRST JUDICIAL DISTRICT

Newman Signs, Inc., a North Dakota Corporation,

Plaintiff

vs.

134-46024

Walter R. Hjelle, as North Dakota State Highway Commissioner, Commissioner, the North Dakota Highway Corridor Board and Allen I. Olson as Attorney General of the State of North Dakota,

Defendants.

MEMORANDUM OPINION

STATE OF NORTH DAKOTA
COUNTY OF CASS

IN DISTRICT COURT

FIRST JUDICIAL DISTRICT

Newman Signs, Inc., a North Dakota Corporation,

Plaintiff,

vs.

Walter R. Hjelle, as North Dakota State Highway Commissioner, the North Dakota Highway Corridor Board and Allen I. Olson as Attorney General of the State of North Dakota,

Defendants.

MEMORANDUM OPINION

On October 22, 1965 the Federal Highway Beautification Act became law. (23 USC 131). Its main purpose was to regulate outdoor advertising along highways and to virtually eliminate billboards in all but commercial and industrial areas.

To insure the cooperation of the states, the Act provided a heavy club to hold over their heads. Any state failing to provide for "effective control" of highway billboard advertising would have to forfeit 10% of all future Federal road construction money.

The North Dakota Highway Commissioner became immediately alarmed. Although the penalty provision of the Federal Act was not to take effect for over two years—and could be even further extended by administrative waiver—the Highway Commissioner was animated to action. On December 3, 1965, he issued a regulation prohibiting further erection of highway billboards without his permission. In March 1966, he issued more detailed rules and regulations which he called an "Interim Policy".

By these two actions, the Highway Commissioner was able to control the erection of new billboards during the interim before the 1967 North Dakota legislative session. When the legislature met, it enacted the North Dakota Highway Beautification Act. (Chapter 24-7 NDCC) This Act became law February 28, 1967. Under its provision control of billboards was to be vested in a new State Board called the Highway Corridor Board.

With reference to billboard control, the North Dakota Act did two notable things: it allowed grandfather treatment for all existing signs; and it fixed a date after which the erection of new signs was to be regulated.

That date when regulation of new signs would start is of vital importance in this lawsuit. In the original 1967 North Dakota Beautification Act such date was the same as that provided in the Federal Act—January 1, 1968. When the 1967 State Act was amended in 1969, however, the starting date became indefinite. The amended version said with reference to such effective date:

". . . January 1, 1968, or any later date established by the Congress of the United States in relation to Title 23, United States Code, Section 131, *or waiver thereof pursuant to said Title 23 . . .*" (Emphasis added)
Sec. 24-17-03 NDCC.

The phrase "or waiver thereof pursuant to . . . Title 23-- is very significant. This alluded to the discretion given Federal Administrative officials under the United States Beautification Act to extend the effective date for a state to comply with the Federal law.

As a matter of fact, the effective date for state compliance was suspended by Federal officials for several years after January 1, 1968. According to the trial testimony confusion and indecision seemed to reign in Washington regarding implementation and enforcement of the Federal Beautification Act. Funds were not made available to carry out its provisions. There were legislative attempts to repeal or to radically alter its provisions.

These circumstances may account in large measure for the Federal Government's long "waiver" of the effective date for the states to comply with the National law. This waiver insofar as North Dakota is concerned lasted until January, 1972. At that time the state was requested to sign an agreement with the Federal Government. Such agreement would establish standards in North Dakota calculated to put this state effectively in control of billboard advertising, and thereby bring it in compliance with the Federal Beautification Act.

On January 6, 1972, the Secretary of Transportation telegraphed an ultimatum to the State Highway Commissioner. He stated that North Dakota must

execute its agreement with the Federal Government by January 20, 1972, or be found in noncompliance. On January 19, the agreement was signed. Thus the hiatus created by Federal waiver of enforcement provisions of the National Act was over. The period of "waiver" referred to in Sec. 24-17-03 came to an end. As indicated earlier, the date which ended the period of Federal waiver became the activating date for Sec. 24-17-03. Thus, until January 19, 1972, North Dakota actually had no viable statute regulating the erection of billboards.[1]

In spite of the lack of a statute, the billboard industry was continuously and effectively controlled in this state commencing December 3, 1965. At first, that control was exercised under regulations issued by the Highway Commissioner, and later by those of the Highway Corridor Board.

A permit system was the core of the regulatory program. An outdoor advertiser was required to apply for a permit for a specified location before erecting a new sign.

Under Federal law, billboards would be tolerated only in commercial and industrial areas. The State therefore adopted the policy of granting permits for signs only in areas encircling population centers. This was called a "circle" or "ring" policy. These areas close upon cities and towns were considered by the State to be commercial or industrial, whether used for such purposes or not.

[1]There was a law in effect controlling signs that created a traffic hazard. Sec. 24-01-12 NDCC. And it might be argued with some force that there was effective statutory authority for billboard control during the period from January 1, 1968 to March 6, 1969. (January 1, 1968 was the beginning date for billboard control established in the 1967

(continued)

The outdoor advertising industry in North Dakota helped to develop the "ring" theory, and was generally satisfied with the State's permit policy. However, it was consistently and vigorously hostile to one proviso in the permit. That provision required waiver of any claims for just compensation in the event Federal standards should later require a permitted sign to be removed. This was extremely important to the advertising industry. There were strong indications that Federal officials would not recognize the "ring" theory. Thus the industry faced the prospect that many billboards within the "ring" would eventually be deemed nonconforming, and would have to come down. It was Hobson's choice for the sign industry—either build under a permit waiving just compensation (and gamble that the sign would continue to be a conforming sign) or not build at all.

As it turned out, the worst fears of the industry became realities. Against a valiant joint effort by industry representatives and the State, the Federal government eventually spurned the "ring" theory for designating commercial and industrial areas.[2] The State was forced to either abandon the ring policy or through non-compliance lose 10% of all Federal road-building funds. With millions of dollars at stake, the choice was plain.

Many billboards of Plaintiff were erected under State permit. Most of them were built pursuant to the

(footnote continued from preceding page)

State Highway Beautification Act. March 6, 1969 was the date of the amendment to that law which extended the beginning date.) However, that argument has not been advanced in this case.

[2]The Federal government had its own exegesis for a commercial and industrial area: In order for an area to be considered commercial or industrial, at least one commercial or industrial business had to be already established there.

ring policy and thereafter became non-conforming. The State now says to Plaintiff that these non-conforming signs must be removed. It says that even though they were built under a state permit, they were not "lawfully erected". It says further that even if lawfully erected, the clause in the permit waiving just compensation forecloses Plaintiff from claiming compensation. It says also that Plaintiff knew of the risks before building the signs—that Plaintiff gambled on the Federal Government accepting the State's "ring" theory—and should therefore not be heard to complain after losing the gamble.

The Plaintiff does not object to removal of signs that are now deemed non-conforming. It recognizes that under the State's agreement with the Federal government, these signs must go. But Plaintiff insists that these permitted signs were "lawfully erected", and are therefore eligible for just compensation. It claims the clause in the permit waiving just compensation is not binding because it was unilaterally imposed over objection and is illegal and unconstitutional.

In addition Plaintiff challenges the legality of the State's entire permit system. It says the State's attempt to regulate outdoor advertising was without statutory authority, and that State officials improperly restricted and interfered with Plaintiff's lawful business.

I find I must reach some conclusions upon these issues at variance with earlier rulings which were made for the purpose of facilitating settlement negotiations. Eight days at trial and considerable subsequent study convince me, at the cost of some embarrassment, that my earlier rudimental impressions require modification.

Under North Dakota law, "lawfully erected" signs, even if non-conforming, cannot be removed without

payment of just compensation to the owner.

> The State Highway Commissioner is directed to acquire by purchase, gift, condemnation or exchange, signs lawfully erected which do not conform . . ."
> Sec. 24-17-05 NDCC

> "Private property shall not be taken . . . for public use without just compensation having been first made to . . . the owner."
> Sec. 14 ND Constitution.

The weightiest issue in the case is whether Plaintiff is entitled to be paid just compensation for removal of non-conforming signs erected during the period December 3, 1965 to January 19, 1972. Under the law last quoted (Sec. 24-17-05) compensation is due only if the non-conforming signs were "lawfully erected".

Were Plaintiff's signs built prior to January, 1972 lawfully erected? I have concluded they were.

As we have seen, there was no law regulating advertising signs along highways in effect in North Dakota until January 19, 1972. The erection of signs was perfectly legal. It therefore follows that any sign erected before January 19, 1972 was "lawfully erected". And if any such sign was later deemed non-conforming, the owner would be entitled to just compensation before its removal. This would apply not only to new signs, but also to old signs that had been repaired, rebuilt, changed or expanded.

It must follow from this conclusion that any attempt by the Highway Corridor Board to regulate the billboard business was without force or effect prior to January 19, 1972. The Board was created by the statute, and its regulations could obviously have no earlier operative date than the statute itself. Thus the Board's regulation concerning permits which required

waiver of just compensation, and the waiver clause in the permit, were void.

They were void for an additional reason. The government may not nullify constitutional rights by insisting on a waiver thereof as a condition for issuing a permit. *U.S. v. Appalachian Electric Power Co.*, 85 L.Ed. 243 (1940).

> ". . . the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations . . . that are repugnant to the Constitution . . ." *W.W. Cargill Co. v. Minnesota,* 45 L.Ed. 619 (1901).

The Constitution was intended to protect the citizen from the heavy hand of government power. It stands between the government and the citizen, protecting against the tendency of governments of all forms to encroach upon individual rights. If it were permissible for the government to compel individual citizens to waive constitution protections, the provisions of the Constitution insuring those rights could be effectively frustrated. Involuntary waivers of constitutional rights are therefore scowled upon by the Courts. 16 CJS Const. Law Sec. 89; *Am. Jur. 2d Const. Law* Sec. 136.

> "A waiver of a constitutional right to be effective must be a voluntary act by the individual . . ."
> *Wendlandt v. Industrial Commission,* 39 N.W.2d 854 (Wis. 1949)

As alluded to early in this opinion, the North Dakota State Highway Commissioner exercised control of the billboard industry from December 3, 1965 until the Highway Corridor Board took over in 1967. He did so on the theory that Sec. 24-04-01 NDCC granted him such authority. That section, reads as follows:

"*Assent to federal aid given.* The legislative consent required by section 1 of the Act of Congress approved July 11, 1916 Public Law No. 156, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes.' is hereby given. The commissioner is authorized and empowered to make all contracts and to do all things necessary to cooperate with the United States government in the construction of roads under the provision of the said act or other act of Congress that may hereafter be enacted. . ."

From the statutory language empowering the Highway Commissioner to "do all things necessary to cooperate with the United States government in the construction of roads," the Commissioner felt he had regulatory dominion over the highway billboard enterprise. He received support for his view in an opinion from the North Dakota Attorney General.

I believe they were both wrong. The statute gives no such authority. And even if it could be interpreted to grant such extensive authority, the statute would be constitutionally faulty because of improper delegation of legislative powers: for giving uncontrolled discretion to an administrative officer to (1) determine subject matter for regulation, (2) determine the necessity and scope of regulation, and (3) determine to whom regulations should apply. These are strictly legislative functions. 1 *Am. Jur. 2d Admin. Law* Sec. 104.

"The Legislature must declare the policy of the law and must definitely fix the legal principles which are to control the action taken."
Montana Dakota Utilities Co. v. Johanneson 153 N.W.2d 414 (1967)

The North Dakota Supreme Court has often affirmed that "the legislative power of the Legislature must be exercised by it alone and cannot be delegated." *Wilder v. Murphy* 218 N.W. 156 (1928); *Montana Dakota Utilities Co. v. Johanneson,* supra; *Nord v. Guy* 141 N.W.2d 395 (1966); *Medical Properties, Inc. v. North Dakota Board of Pharmacy* 180 N.W.2d 87 (1956); *State v. Jones* 23 N.W.2d 54 (1946).

So if, as contended by the Highway Commissioner, Sec. 24-04-01 gave him the right to supervise and regulate the highway billboard industry then that law is unconstitutional. However, I do not view the statute as conferring such grant of authority upon the Highway Commissioner; and I find the attempt of the Highway Commissioner to exercise such authority to be an invalid usurpation of legislative authority. 2 *Am. Jur. 2d Admin. Law* Sec. 328.

"It is a basic rule of administrative law that administrative regulations which go beyond what the legislature has authorized are void."
Medical Properties v. North Dakota Board of Pharmacy 80 N.W.2d 87 (1956)

The Plaintiff contends that the Highway Corridor Board did not formally adopt regulations until August 31, 1973. Hence, it is claimed, just compensation is due for any nonconforming signs erected prior to that date. In their brief, Plaintiff's attorneys state:

"The plaintiff does not agree there were any rules and regulations of the Highway Corridor Board until August 1, 1973, because the North Dakota Act requires that the rules and regulations be first published for hearing and after hearing be again published as adopted. The proposed rules and regulations of the Highway Corridor Board were

> noticed for public hearing on December 8, 1967, . . . The hearing was held in January of 1968, but it was not until August 1, 1973, that the rules and regulations were finally adopted. The plaintiff contends that the period of time which elapsed was unreasonable and the process which the Highway Corridor Board followed failed to follow any reasonable standards for adoption of rules and regulations."

The testimony indicated that during all times mentioned Harold Newman was a member of the five-man Highway Corridor Board. Mr. Newman is President, and with his wife, owns all the capital stock of the Plaintiff company. He was also at all pertinent times the president of the North Dakota Outdoor Advertising Association. He was the industry's representative on the Highway Corridor Board. If there was unreasonable lapse of time, or the Board was otherwise remiss in failing to adopt regulations, Mr. Newman, as a Board member must share that responsibility. It would seem an anomaly, indeed, if the company he owns, or the industry he represented on the Board, should profit from alleged negligence for which he would be at least partly blameworthy. I therefore conclude that Plaintiff is estopped from asserting a right to just compensation for nonconforming signs erected after January 19, 1972.

The above conclusions either dispose of or render moot the cardinal issues presented by the first five causes of action. However, Findings of Fact will not be filed until after the pre-trial conference on the sixth cause of action. That pre-trial conference is hereby set

for October 7, 1976, commencing at 10:00 A.M.

Dated this 21st day of September, 1976.

BY THE COURT:

/s/

Ralph B. Maxwell,
Judge
First Judicial District

APPENDIX E.

CONSTITUTIONAL AND OTHER PROVISIONS

APPENDIX E. 1.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, Amendment One:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, Amendment Fourteen:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E. 2.

STATUTORY PROVISIONS

APPENDIX E. 2. a.

TITLE 23 UNITED STATES CODE, SECTION 131, PUBLIC LAW NO. 89-285

TITLE 23 UNITED STATES CODE, SECTION 131 (AS AMENDED)

§ 131. Control of outdoor advertising

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-

of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be

limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located (3) signs, displays, and devices advertising activities conducted on the property on which they are located, and (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures of natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way areas adjacent tot he Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secre-

tary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act [23 USCS §§131 and notes, 135 note, 136, 319]. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law. The Federal share of

such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

(h) . . .

(i) . . .

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) . . .

(l) . . .

(m) . . .

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the

just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

Section 401 of Act Oct. 22, 1965, provided: "Nothing in this Act [23 USCS Sections 131 and notes, 135 note, 136, 319] or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act [23 USCS Sections 131 and notes, 135 note, 136, 319]."

APPENDIX E. 2. b.

NORTH DAKOTA CENTURY CODE, CHAPTER 24-17

NORTH DAKOTA CENTURY CODE (AS AMENDED)

CHAPTER 24-17

REGULATION OF OUTDOOR ADVERTISING ADJACENT TO HIGHWAYS

Section	
24-17-01	Declaration of policy.
24-17-02	Definitions.
24-17-03	Limitations of outdoor advertising within six hundred sixty feet [201.17 meters].
24-17-03.1	Limitations of outdoor advertising beyond six hundred sixty feet [201.17 meters].
24-17-04	Removal of signs.
24-17-05	Compensation for removal of signs.
24-17-06	Highway corridor board—Members.
24-17-07	Organization of the board.
24-17-08	Compensation of board members.
24-17-09	Duties and powers of the board.
24-17-10	Rules and regulations have the force and effect of law.
24-17-11	Unlawful advertising.
24-17-12	Enforcement.

24-17-13 Hearings.
24-17-14 Publication of resolutions, rules or regulations.
24-17-15 Appeals to district court.

24-17-01. Declaration of policy.—It is hereby declared to be in the public interest reasonably to regulate advertising devices along the highways hereinafter specified while, at the same time, recognizing that both the convenience of travel and the interests of the economy as a whole require a reasonable freedom to advertise. It is the intention of the legislative assembly in this chapter to provide a statutory basis for the reasonable regulation, but not the prohibition, of outdoor advertising through zoning principles and standards consistent with the public policy relating to the areas adjacent to the state highway system pursuant to title 23, United States Code, section 131 and section 319 and rules and regulations promulgated thereunder. It is further declared to be in the public interest to review all rights now acquired by the State of North Dakota for the use and benefit of the state highway department pertaining to the right and control over the erection, location or maintenance of billboards, signs or any form of advertising adjacent to the state highway system, to determine and designate such areas adjacent to the state highway system as are necessary for the restoration, preservation and enhancement of scenic beauty and to vacate to the owner such property rights acquired in areas not so determined and designated.

24-17-02. Definitions.—

1. "Commissioner" shall mean the North Dakota state highway commissioner or his authorized agents.
2. "Outdoor advertising" means a sign, display or device of any kind or character including statuary, erected or maintained for outdoor advertising purposes, upon which any poster, bill, printing, painting or other advertisement of any kind whatsoever may be placed for advertising purposes, on or affixed to the ground or any tree, wall, bush, rock, fence, building, structure or thing, either privately or publicly owned. The terms "sign, display, or device" comprehend all forms of outdoor advertising and the use of one such term in this chapter includes all forms of outdoor advertising.
3. "State highway system" shall mean the state highway system as defined in subsection 42 of section 24-01-01.1
4. "Erect" means to construct, build, raise, asemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish.
5. "Maintain" means to exist.
6. "Board" shall mean the highway corridor board.

24-17-03. Limitations of outdoor advertising within six hundred sixty feet [201.17 meters].—Subject to the provisions of this chapter no sign shall, after January 1, 1968, or any later date established by the Congress of the United States in relation to title 23, United States Code, section 131, or waiver thereof pursuant to said title 23, be erected or maintained within six hundred and sixty feet [201.17 meters] from the nearest edge of

the right-of-way and visible from the main traveled way of any highway which is a part of the state highway system in this state except the following:

1. Official signs and notices, directional signs and notices, which shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historic attractions and outdoor recreational areas subject to the national standards to be promulgated by the secretary of transportation.
2. Signs advertising the sale or lease of property upon which they are located.
3. Signs specifically advertising activities conducted, services rendered, goods sold, stored, produced or mined, or the name of the enterprise on the property and which are within fifty feet [15.24 meters] of the area used for the purpose advertised and upon which they are located.
4. Signs in areas which are now or hereafter zoned industrial, commercial, or the like by the board as provided in this chapter.
5. Signs in unzoned commercial or industrial areas, which now or hereafter qualify as such, pursuant to the agreement between the board and the secretary of transportation according to title 23, United States Code, section 131.
6. Signs relocated by reason of the construction or reconstruction of the state highway system.
7. Official highway signs within interstate rights of way giving specific information for the traveling public pursuant to title 23, United States Code, section 131(f) and the rules and regulations promulgated thereunder.
8. Signs calling attention to the location of buried utility lines.

24-17-03.1. Limitations of outdoor advertising beyond six hundred sixty feet [201.17 meters].—Subject to the provisions of this chapter, no sign shall, after July 1, 1977, be erected or maintained beyond six hundred sixty feet [201.17 meters] from the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the highway system, and erected with the purpose of their message being read from such main traveled way except the following:

1. Directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions which are required or authorized by law.
2. Signs, displays, and devices advertising the sale or lease of property upon which they are located.
3. Signs, displays, and devices advertising activities conducted on the property on which they are located.

24-17-04. Removal of signs.—Any sign lawfully in existence along the state highway system on February 28, 1967, which is in conformity with this chapter and the regulations established by the board shall not be required to be removed until sixty months have elapsed following the date of its erection; provided, however, that no such sign shall be required to be removed before July 1, 1970. Any sign lawfully in existence along the state highway system on February 28, 1967, which does not conform to this chapter or the regulations established by the board shall not be required to be removed until the end of the fifth year after it becomes nonconforming unless acquired pursuant to section 21-17-05.

24-17-05. Compensation for removal of signs.— The commissioner is directed to acquire by purchase, gift, condemnation, or exchange, signs lawfully erected which do not conform to this chapter or the regulations established by the board. Owners of advertising structures, signs, displays, or devices acquired by the commissioner pursuant to this section, and the owners of the land upon which such displays are located shall be paid just compensation for the reasonable damages, if any, suffered by the reason of such removal.

Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected and maintained under state law, provided that federal matching funds are appropriated, allotted, and made available to this state under title 23, United States Code, for the purpose of providing just compensation for the removal of such signs, displays, or devices. Should any outdoor advertising sign, display, or device which was erected upon the issuance of an outdoor advertising permit pursuant to the interim policy of the commissioner or the board be determined to have been erected and maintained under state law for purposes of compensation as provided herein, then payment not to exceed the value of such sign at the expiration date of the existing permit, or at the date the removal is initiated, whichever is earlier, shall be deemed just compensation as required under the provisions of this section. No municipalities, county or local zoning authorities, or political subdivision shall remove or cause to be removed any advertising structures, except such structures that encroach upon the right-of-way, without paying compensation in accordance with this section.

24-17-06. Highway corridor board—Members.— There is hereby established, to serve as an agency of the state and to perform the functions conferred upon it in this chapter, the highway corridor board. The board shall be composed of the following five members: the North Dakota state highway commissioner or his authorized agent; the director of the business and industrial development department or his authorized agent; the commissioner of agriculture or his authorized agent; a representative of the North Dakota outdoor advertising association to be designated by its president and to serve a term of four years; a representative of the North Dakota motel association designated by its president to serve a term of two years. At the expiration of the term of any member appointed to the board, his successor shall be appointed for a term of four years.

24-17-07. Organization of the board.— The permanent chairman of the board shall be the state highway commissioner or his duly authorized agent, and the board may elect such other officers as it may deem appropriate from its membership. The majority of the board in meeting duly assembled, may perform and exercise all the duties and powers devolving on the board. Staffing for the board shall be furnished by the state highway department, which shall also be responsible for furnishing it such other supplies and equipment as may be required. The state highway department shall furnish the board with such maps, charts, plats, photographs and all other information and assistance as may be required by it, relating to the affected areas and its duties as hereinafter set forth. The board shall meet upon call of the chairman or upon written notice of two members of the board.

24-17-08. Compensation of board members.—The appointed members of the board shall receive as compensation for their services the sum of twenty dollars for each day's attendance at its meetings, and shall be compensated for meals, lodging and travel at the same rate and in the same manner as other state officials. Vouchers required to be submitted prior to reimbursement shall be approved by the chairman of the board, and any and all compensation specified in this section shall be paid out of funds derived from the fees for permits issued for outdoor advertising structures. Any and all funds derived from the fees or permits not expended for the expenses of the board shall be placed in the highway fund for the purpose of enforcing this chapter, and should there be a deficit for the purpose of enforcing this chapter or to meet expenses of the board, highway funds may be expended to meet such deficit.

24-17-09. Duties and powers of the board.—The board shall perform the following functions:

1. For the purpose of promoting the public health, safety, welfare, convenience, enjoyment and recreational value of the public highways, to protect the public investment in the state highway system and to preserve the natural beauty of lands bordering on the state highway system, the board may establish one or more zoning districts in the areas lying within six hundred and sixty feet [201.17 meters] of the nearest edge of the right of way of any highway which is a part of the state highway system and shall enact suitable regulations to carry out the purposes of this chapter. These regulations

shall be uniform in each district, but the regulations in one district may differ from those in other districts. No regulation or restriction, however, shall prohibit or prevent the use of land or buildings for farming or any of the normal incidents of farming.

2. These regulations shall be made in accordance with the comprehensive plan and design for any and all of the following purposes:
   a. To protect and guide the development of nonurban areas.
   b. To regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures; the height, number of stories and size of buildings and structures; percentage of lot that may be occupied; size of courts, yards and other open spaces; the density of the population; and the location and use of buildings, structures, and the land for trade, industry, residence, or other purposes adjacent to highways outside of municipalities.
   c. To designate tracts of land adjacent to the state highway system which are necessary for the restoration, preservation and enhancement of scenic beauty.
   d. To regulate the erection, construction or placing of any sign, display or device within six hundred and sixty feet [201.17 meters] of the nearest edge of the right-of-way and to adopt standards relating to size, lighting and spacing thereof in conformity with section 131 of title 23, United States Code, provided said

regulations are not more restrictive than those provided thereunder.

e. To establish permits authorizing the erection, construction, placement, replacement, repair and maintenance of any outdoor sign, display, or device, which is within six hundred and sixty feet [201.17 meters] of the nearest edge of the right-of-way and visible from any place on the main traveled way of the state highway system; to establish a fee schedule for such permits and to prescribe regulations for the issuance thereof by the commissioner.

f. To determine unzoned commercial or unzoned industrial areas along the state highway system by agreement between the board and the secretary of transportation of the United States pursuant to title 23, United States Code, section 131.

3. The board shall review all rights now acquired by the state of North Dakota for the use and benefit of the state highway department pertaining to the right and control over the erection, location or maintenance of billboards, signs or any form of advertising within six hundred and sixty feet [201.17 meters] from the nearest edge of the right-of-way of the state highway system, and should the board determine that such rights previously acquired are not necessary to accomplish the purpose of this chapter then such rights shall be vacated pursuant to section 24-01-28.

4. The board shall designate which tracts of land are necessary for the restoration, preservation and enhancement of scenic beauty adjacent to the state highway system. Said board shall accurately describe such areas and file such designation with the North Dakota state highway department. The commissioner shall acquire, improve and maintain said tracts of land the board deems necessary for the restoration, preservation and enhancement of scenic beauty adjacent to the state highway system, and said tracts of land may be beyond six hundred and sixty feet [201.17 meters] of the nearest edge of the right-of-way.

The interest in any land directed to be acquired and maintained under this section may be a fee simple or any lesser interest, as determined by the board to be reasonably necessary to accomplish the purposes of this section. Such acquisition may be by gift, purchase, exchange or condemnation under the right and power of eminent domain in the same manner that the commissioner may acquire right-of-way for construction, reconstruction, widening, alteration, changing, locating, relocating, aligning, realigning or maintaining a state highway.

24-17-10. Rules and regulations have the force and effect of law.—All determinations, rules, regulations, and promulgations by the board shall be filed with the commissioner and shall have the force and effect of law upon such filing.

24-17-11. Unlawful advertising.—Any advertising sign which violates the provisions of this chapter or the regulations adopted by the board is hereby declared to be illegal. The commissioner shall give thirty days' notice, by certified mail, to the owner thereof to remove the same if it is a prohibited sign, or cause it to conform

to regulations promulgated by the board if it is an authorized sign. If the owner fails to act within thirty days as required in the notice, or if the commissioner is unable to ascertain the ownership of the sign, then such sign shall be deemed abandoned and the commissioner may remove such sign, and to this end he may enter upon private property for the purpose of removing such sign without liability for his actions.

24-17-12. Enforcement.—The commissioner shall enforce the provisions of this chapter and the regulations adopted by the board through the remedy of injunction or other appropriate legal proceedings, and shall not act except through such proceedings, except as set forth in section 24-17-11. Neither the commissioner nor any other agency nor political subdivision of this state shall, by plantings, obstruct the view or in any other way interfere with the effectiveness of any sign legally in place under the provisions of the chapter and the regulations adopted by the board.

24-17-13. Hearings.—The board may propose resolutions, rules or regulations to be promulgated, and shall hold public hearings thereon in the state capitol. Such proposed resolutions, rules or regulations to be promulgated shall be published in the official county newspaper of the county wherein tracts of land which will be affected by such resolution, rule or regulation are located, once each week for three consecutive weeks giving notice of the time, place and purpose of the hearing so that parties in interest and citizens shall have an opportunity to be heard.

24-17-14. Publication of resolutions, rules or regulations.—Following the public hearings, the board may adopt the proposed resolutions, rules or regulations with such changes as it may deem advisable. Forthwith at the adoption of any such resolution, rule or regulation, the board shall cause the same to be published for three consecutive weeks in the official newspaper of the county wherein tracts of land which will be affected by such resolutions, rules or regulations are located. Proof of such publication shall be filed in the office of the county auditor of the county wherein tracts of land which will be affected by such resolutions, rules or regulations shall take effect. Any such resolutions, rules or regulations may, from time to time, be amended or repealed by the board upon like proceedings as in the case of the adoption of resolutions, rules or regulations. Upon adoption of any resolutions, rules or regulations hereunder, the county auditor shall cause notice thereof filed with the register of deeds.

24-17-15. Appeals to district court.—Any person, or persons, jointly and severally, aggrieved by a decision of the board under this chapter, may appeal therefrom to the district court and to the supreme court in accordance with sections 28-32-15 through 28-32-21, provided, however, that no other sections in chapter 28-32 shall be applicable to any proceedings of the board.

APPENDIX E. 3.

ADMINISTRATIVE PROVISIONS

APPENDIX E. 3. a.

NORTH DAKOTA HIGHWAY COMMISSIONER'S RULES AND REGULATIONS (*)

RULE AND REGULATION GOVERNING CONTROL OF BILLBOARD ADVERTISING ALONG INTERSTATE AND PRIMARY HIGHWAYS

I, Walter R. Hjelle, the duly appointed and constituted North Dakota State Highway Commissioner, by and through the powers and duties vested in me, do hereby adopt the following rule and regulation:

The establishment of billboard advertising along interstate and primary highways in the State of North Dakota shall be prohibited within 660 feet from the nearest edge of the right-of-way unless permission to so establish billboard advertising within 660 feet from the nearest edge of the right-of-way along interstate and primary highways is requested in writing and the permission requested is granted in writing by the North

* (No other rules or regulations were ever promulgated by the North Dakota State Highway Commissioner to regulate signs. See North Dakota Administrative Code, Title 37. But see Appendix E. 3. b.)

Dakota State Highway Commissioner.

This rule and regulation shall be in effect from and after its filing with the Attorney General's office as prescribed in §28-32-03 of the NDCC.

Dated at Bismarck, North Dakota this 2nd day of December, 1965.

/s/

Robert E. Bradley,

Chief Engineer
For and on behalf of
Walter R. Hjelle,
State Highway
Commissioner

Filed in the office of the Attorney General
this 3rd day of December, 1965.

/s/ Helgi Johanneson

APPENDIX E. 3. b.

NORTH DAKOTA HIGHWAY COMMISSIONER'S INTERIM POLICY

PROPOSED INTERIM POLICY ON BILLBOARD CONTROL

1. Purpose—The purpose of this policy is to provide for clearing of billboards from rights-of-way of construction projects and to permit reasonable and controlled erection of signs and billboards until standards are promulgated by the Secretary of Commerce.

2. Duration—This policy shall be in force beginning with the date of its issuance by the State Highway Commissioner and ending with the effective date of standards promulgated by the Secretary of Commerce.

3. Billboards erected prior to December 2, 1965, and required to be removed from the right-of-way in conjunction with construction projects will be paid for on a relocation basis under the current department policies. No permit shall be required for their removal and re-erection.

4. The following requirements will pertain to all future signs or billboards to be located within 660 feet of the right-of-way and visible from the main traveled lanes of an Interstate or Primary system highway.

5. No permits shall be required for signs or billboards advertising the sale or lease of the property on which they are located and signs or billboards advertising activities conducted on the premises on which they are located.

6. No sign or billboard except as provided in Paragraph 5 may be newly erected unless authorized by a permit issued by the State Highway Commissioner. The cost of each permit shall be $5.00 to defray administrative costs. Each sign shall require a separate permit.

7. Outside of municipal limits, the size, spacing and location of signs shall be in accordance with the proposal submitted by the Outdoor Advertising Association of North Dakota at the Highway Beautification Act Public Hearing in Bismarck, North Dakota, on March 1, 1966.

8. Inside of municipal limits, the location of signs shall be in accordance with city zoning. Sizes of signs shall not exceed the dimensions presented by the Outdoor Advertising Association of North Dakota at the above mentioned Public Hearing.

9. Lighting and placing of all signs shall conform to sound safety standards.

10. Permits will be granted for a term extending to January 1, 1970, unless sooner invalidated by agreement between the State Highway Commissioner and the Secretary of Commerce or by standards adopted by the Secretary of Commerce, at which time the sign must be removed by the permittee unless extended by the State Highway Commissioner. The permittee must agree to save the State harmless from any costs or liabilities arising from the removal of the sign and cancellation of the lease between sign owner and the landowner.

Upon the payment of $5.00, _____ is hereby authorized to erect and maintain a sign, display or device for advertising purposes to be located at:

This permit will remain in effect until January 1, 1970, unless such sign, display or device shall violate any of the rules, regulations or policies as adopted by the Secretary of Commerce relative to such signs or shall violate the provisions of any agreement entered into by and between the Secretary of Commerce and the North Dakota State Highway Commissioner, relating to such signs, displays or devices, and thereafter may be renewed, at the option and sole discretion of the Highway Commissioner, for a period to be determined by the parties.

In the event that this permit is not renewed on or before January 1, 1970 or prior thereto or at any time thereafter, the permittee agrees to remove the sign, display or device within thirty (30) days after the expiration of this permit or the renewal period.

Any sign, display or device erected by virtue of this permit shall conform to the rules and regulations governing such signs, displays or devices as promulgated by the Highway Commissioner, the Secretary of Commerce and any agreement between the Secretary of Commerce and the North Dakota State Highway Commissioner.

Noncompliance in any respect, shall void all rights of the permittee and be cause for the Commissioner ordering the removal of the sign, device or display, unless within 5 (five) days of notice of noncompliance the sign, device or display is altered, changed or modified to comply with the aforesaid requirements.

Any and all costs of removing a sign, device or display, regardless of the cause of removal, shall be the responsibility of the permittee.

UNDER NO CIRCUMSTANCES WILL THE PERMITTEE BE PAID JUST COMPENSATION FOR THE REMOVAL, CHANGING, ALTERING OR MODIFICATION OF ANY SIGN, DEVICE OR DISPLAY ERECTED BY VIRTUE OF THIS PERMIT AND THE PERMITTEE EXPRESSLY WAIVERS HIS RIGHTS, IF ANY, TO SUCH REDRESS.

This permit shall not be assignable without the written consent of the Highway Commissioner.

Population	*Class "A"*		*Class "B"*		*Class "C"*	
		Miles		Miles		Miles
0 - 99	700′	½	900′	½	1000′	1
100 - 499	700′	½	900′	½	900′	1
500 - 999	700′	1	900′	1	1000′	1
1000 - 1999	700′	1	900′	1	1000′	1
2000 - 4999	700′	2	900′	2	1000′	1
5000 - 9999	700′	2	900′	2	1000′	1
10000 - 19999	700′	3	900′	3	1000′	2
20000 - 29999	700′	3	900′	3	1000′	2
30000 - Over	700′	3	900′	3	1000′	2

All intersections marked on map shall be considered a Class C area, (1000′ spacing). No sign closer than 700′ from highway intersection or interchange. 200′ from beginning of ramp.

APPENDIX E. 3. c.

NORTH DAKOTA HIGHWAY CORRIDOR BOARD INTERIM POLICY

HIGHWAY CORRIDOR BOARD

INTERIM POLICY ON BILLBOARD CONTROL

1. Purpose—The purpose of this policy is provide for clearing of billboards from rights-of-way of construction projects and to permit reasonable and controlled erection of signs and billboards until final standards are promulgated by the Highway Corridor Board in agreement with the Secretary of Transportation.
2. Duration—This policy shall be in force beginning with the date of its issuance and shall end upon the promulgation of the final standards by the Highway Corridor Board in agreement with the Secretary of Transportation.
3. Billboards erected prior to December 2, 1965, and required to be relocated from the right-of-way solely to accommodate construction projects will be paid for on a relocation basis under the current highway department policies. No permit will be required for re-erection. Where it is impossible to relocate the sign within one mile, the sign will be removed and just compensation will be paid for its removal.

4. The following requirements will pertain to all future signs or billboards to be located within 660 feet of the nearest edge of the right-of-way and visible from the main traveled lanes of a highway on the State Highway System. No permits will be issued on Interstate Highway No. 94 where advertising controls have been purchased excepting previously permitted areas of the bypasses of Dickinson and Bismarck-Mandan. These areas are defined as follows:

   Dickinson: Beginning one mile west of the interchange bridge of the west Dickinson interchange and extending to one mile east of the interchange bridge of the east Dickinson interchange.

   Bismarck-Mandan: Beginning one mile west of the interchange bridge of the west Mandan interchange at Sunset Road and extending to one mile east of the interchange bridge at the east Bismarck spur interchange.

5. No permits shall be required for signs under the following circumstances:

   (1) Official signs and notices, directional signs and notices, which shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historic attractions and outdoor recreational areas subject to the national standards to be promulgated by the Secretary of Transportation.

   (2) Signs advertising the sale or lease of property upon which they are located.

   (3) Signs specifically advertising activities conducted, services rendered, goods sold, stored, produced or mined, or the name of the enterprise on the property and which are within fifty feet of the area used for the purpose advertised and upon which they are located.

   (4) Official highway signs within interstate rights of way giving specific information for the traveling public pursuant to title 23, United States Code, section 131(f) and the rules and regulations promulgated thereunder.

   (5) Signs calling attention to buried utility lines.

6. No sign or billboard except as provided in Paragraph 5 may be newly erected unless authorized by a permit issued by the Highway Corridor Board. The cost of each permit shall be $5.00. Each sign shall require a separate permit.

7. Spacing of signs shall be in accordance with the Class A, Class B and Class C type areas as related to the population of a town or city intersected by a state highway as shown as Attachment No. 1. The spacing is applicable to each side of the highway. Type C spacing is applicable to the intersection of two state highways if not eligible for Type A or B classification. The maximum size for any sign shall be 650 square feet, including trim. No sign shall exceed the following limits:

   (1) Maximum height — 25′
   (2) Maximum length — 50′

   All dimensions include border, trim, cutouts and extensions, but exclude decorative bases and supports. Double faced, back to back or V-type

signs shall be considered as two signs and the maximum size for each face shall not exceed 325 square feet.

8. Inside of municipal limits, the location of signs shall be in accordance with the following minimum spacing criteria to be applied separately to each side of a state highway within the municipal limits:

   (1) Where the distance between centerlines of intersecting streets or highways is less than 1500', two signs shall be permitted between such intersecting streets or highways.

   (2) Where the distance between centerlines of intersecting streets or highways is 1500' or more, minimum spacing between signs shall be 500'.

   Two signs will be permitted at a single location, either double faced, V-type or back to back, but any such signs shall be at least 1000' from any other sign. The above spacing criteria, however, shall not extend to areas inside municipalities where signs are prohibited by municipal zoning.

9. Lighting and placing of all signs shall conform to sound safety standards.

10. Permits will be granted for a term extending to January 1, 1970, unless sooner cancelled by the Highway Corridor Board, at which time the sign must be removed by the permittee unless extended by the Highway Corridor Board. The permittee must agree to save the state harmless from any costs or liabilities arising from the removal of

the sign and cancellation of the lease between sign owner and landowner.

/s/

Jon R. Kerian,
Chairman
Highway Corridor
Board

Policy Attachment No. 1

Population	*Class "A"*		*Class "B"*		*Class "C"*	
		Miles		Miles		Miles
0 - 99	700'	½	900'	½	1000'	1
100 - 499	700'	½	900'	½	900'	1
500 - 999	700'	1	900'	1	1000'	1
1000 - 1999	700'	1	900'	1	1000'	1
2000 - 4999	700'	2	900'	2	1000'	1
5000 - 9999	700'	2	900'	2	1000'	1
10000 - 19999	700'	3	900'	3	1000'	2
20000 - 29999	700'	3	900'	3	1000'	2
30000 - Over	700'	3	900'	3	1000'	2

All intersections of state highways other than above shall be considered a Class C area, (1000' spacing). No sign closer than 700' from highway intersection or interchange. 200' from beginning of ramp.

ADDENDUM TO THE INTERIM POLICY

Criteria for "Off Premise" Billboard Erection Without Formal Permit

Letter permission will be granted for the erection of advertising structures without regard to the Interim

Policy and in areas where billboard control had *not* been acquired, provided there is conformance to the following criteria.

1. The ground lease must have been in effect prior to December 3, 1965.
2. The actual size of the sign must have been selected.
3. A contract for advertising at the contemplated site must have been executed prior to December 3, 1965.

AND

The sign or billboard must have been either on hand, in transit, ordered or down at the particular site through forces other than physical decay.

Signs may not be extended to create a double panel, "V" shape sign or a back to back panel added without a permit for the addition.

March 21, 1967

/s/

Jon R. Kerian,
Chairman
Highway Corridor
Board

APPENDIX E. 3. d.

NORTH DAKOTA HIGHWAY CORRIDOR BOARD RULES AND REGULATIONS

NORTH DAKOTA ADMINISTRATIVE CODE

TITLE 36

HIGHWAY CORRIDOR BOARD

The Highway Corridor Board is not necessarily subject to the provisions of the Administrative Agencies Practice Act (North Dakota Century Code chapter 28-32) relating to rulemaking and hearings. See North Dakota Century Code section 24-17-15. However, the board has placed its rules in the style and format required for the North Dakota Administrative Code and the rules of the board are published as title 36.

Article	
36-01	General Administration
36-02	Placement, Maintenance, Size, Spacing, and Lighting of Outdoor Advertising Structures

ARTICLE 36-01

GENERAL ADMINISTRATION

Chapter
36-01-01 Organization of Board

CHAPTER 36-01-01
ORGANIZATION OF BOARD

Section
36-01-01-01 Organization of Highway Corridor Board

36-01-01-01. Organization of Highway Corridor Board.

1. HISTORY. The 1967 legislative assembly created the highway corridor board by legislation codified as North Dakota Century Code chapter 24-17. The board is attached to the highway department for administrative purposes pursuant to North Dakota Century Code section 24-17-07.
2. BOARD MEMBERSHIP. The board consists of five members: the state highway commissioner or the commissioner's authorized agent, the director of the business and industrial development department or the director's authorized agent, a representative of the North Dakota outdoor advertising association designated by its president, and a representative of the North Dakota motel association designated by its president. The appointed

members of the board serve four year terms, with the term of one member expiring every two years. The state highway commissioner or the commissioner's authorized agent is the chairman of the board.

3. FUNCTIONS. The highway corridor board has the authority to establish zoning districts adjacent to the state highway system, develop comprehensive planning for the area adjacent to the state highways, designate tracts of land necessary for the restoration, preservation, and enhancement of scenic beauty, regulate the erection, construction, and maintenance of outdoor advertising structures adjacent to the state highway system, and to provide for the permits authorizing the erection of outdoor advertising structures adjacent to the state highway system.
4. COMMISSIONER'S AGENT. The management director of the state highway department is the highway commissioner's authorized agent on the highway corridor board.
5. INQUIRIES. Inquiries regarding the board may be addressed to the management director:

   Mr. Harlan Fuglesten
   Management Director
   Highway Corridor Board
   Highway Building
   Capitol Grounds
   Bismarck, North Dakota 58505

General Authority
NDCC 28-32-02.1

Law Implemented
NDCC 28-32-02.1

ARTICLE 36-02

PLACEMENT, MAINTENANCE, SIZE, SPACING, AND LIGHTING OF OUTDOOR ADVERTISING STRUCTURES

Chapter

36-02-01	Application and Permit
36-02-02	Placement and Maintenance of Signs
36-02-03	Size and Spacing — Penalty

CHAPTER 36-02-01 APPLICATION AND PERMIT

Section

36-02-01-01	Permit Required
36-02-01-02	Application for Permit
36-02-01-03	Permit Fee
36-02-01-04	Permit — Issued by Highway Commissioner
36-02-01-05	Permit Period
36-02-01-06	Permit Number
36-02-01-07	Permit License

36-02-01-01. Permit Required. Except as herein provided, no person shall place or maintain any advertising structure within six hundred sixty feet (201.17 meters) of the nearest edge of the right of way of

any highway on the state highway system without having first secured a written permit from the highway commissioner or the commissioner's authorized agent.

General Authority NDCC 24-17-09 — Law Implemented NDCC 24-17-03

36-02-01-02. Application for Permit. The application shall be filed on the form prescribed by the highway corridor board and shall be furnished by the highway commissioner or the commissioner's agent.

General Authority NDCC 24-17-09 — Law Implemented NDCC 24-17-09

36-02-01-03. Permit Fee. There is herewith imposed upon each advertising structure a fee in the sum of five dollars for a license period of five years. Only signs in conforming areas need be licensed. All other signs may be tagged for identification by the highway commissioner.

General Authority NDCC 24-17-09 — Law Implemented NDCC 24-17-09

36-02-01-04. Permit—Issued by Highway Commissioner. The permit license shall be supplied by the highway commissioner in conformance with directions adopted by the highway corridor board, and shall bear the permit number of the advertising structure to which

it is assigned.

General Authority
NDCC 24-17-09

Law Implemented
NDCC 24-17-09

36-02-01-05. Permit Period. Permits to erect and maintain signs shall come due October 1, 1973, and shall be renewed each five year period thereafter.

General Authority
NDCC 24-17-09

Law Implemented
NDCC 24-17-09

36-02-01-06. Permit Number. Each permit provided in this chapter shall carry an identification number and shall entitle the holder to place the advertising structure described in the application.

General Authority
NDCC 24-17-09

Law Implemented
NDCC 24-17-09

36-02-01-07. Permit License. No person shall place any advertising structure unless there is securely fastened thereon a permit license of the character specified in section 36-02-01-04. The placing of any advertising structure without having affixed thereto a permit license is prima facie evidence that the advertising structure has been placed and is being maintained in violation of the provisions of this chapter and any such structure shall be subject to removal as provided in North Dakota Century Code section 24-17-11.

General Authority
NDCC 24-17-09

Law Implemented
NDCC 24-17-09

CHAPTER 36-02-02
PLACEMENT AND MAINTENANCE OF SIGNS

Section

36-02-02-01 Owner Name to be Displayed

36-02-02-02 Placement and Lighting

36-02-02-03 Damaged Signs — Removal

36-02-02-01. Owner Name to be Displayed. No advertising structure shall be placed or maintained unless the name of the person owning or maintaining it is plainly displayed thereon.

General Authority
NDCC 24-17-09

Law Implemented
NDCC 24-17-09

36-02-02-02. Placement and Lighting. No advertising structure shall be placed or maintained in any of the following locations or positions or under any of the following conditions:

1. Within the right-of-way of any highway.
2. If visible from any highway and simulating or imitating any official directional, warning, danger, or informational sign, or if intended or likely to be construed as giving warning to traffic such as by the use of the words "stop" or "slow down".
3. If not maintained in safe condition.
4. If visible from any highway and displaying any red or blinking or intermittent light likely to be mistaken for a warning or danger signal.

5. If any illumination thereon shall be of such brilliance and so positioned as to blind or dazzle the vision of travelers on adjacent highways or create the impression that the lights are from oncoming or intersecting vehicles. Such condition shall be alleviated within ten days on notification of the highway commissioner.
6. Upon a scenic highway or nearer than one thousand feet (304.8 meters) from the designated start or finish of such highway outside the limits of municipalities.

General Authority NDCC 24-17-09 — Law Implemented NDCC 24-17-09

36-02-02-03. Damaged Signs—Removal. Damaged, defaced, poorly maintained, or structurally unsound signs shall be repaired within ninety days after notice by the highway commissioner and if they are not repaired, the highway commissioner shall cause them to be removed.

General Authority NDCC 24-17-09 — Law Implemented NDCC 24-17-09

CHAPTER 36-02-03
SIZE AND SPACING—PENALTY

Section

36-02-03-01 Size of Signs
36-02-03-02 Spacing of Signs
36-02-03-03 Penalty

36-02-03-01. Size of Signs. The maximum area for any one sign shall be one thousand two hundred square feet (111.48 square meters) with a maximum height of thirty feet (9.14 meters) and a maximum length of sixty feet (18.29 meters) inclusive of any border and trim but excluding the base or apron, supports, and other structural members. The area shall be measured by the smallest square, rectangle, triangle, circle, or any combination thereof which will encompass the entire sign. The maximum size limitations shall apply to each side of the sign structure; and signs may be placed back-to-back, side-by-side, or in V-type construction with not more than two displays to each facing, and such sign structure shall be considered as one sign.

General Authority NDCC 24-17-09 — Law Implemented NDCC 24-17-09

36-02-03-02. Spacing of Signs.

1. Interstate and federal-aid primary highway signs may not be located in such a manner as to obscure or otherwise physically interfere with the effectiveness of an official traffic sign, signal, or device, or

obstruct or physically interfere with the driver's view of approaching, merging, or intersecting traffic.

2. Interstate highways and expressways on the federal-aid primary system:
   a. No two structures shall be spaced less than five hundred feet (152.4 meters) apart.
   b. Outside of incorporated cities, no structure may be located adjacent to or within five hundred feet (152.4 meters) of an interchange, intersection at grade, or safety rest area. The five hundred feet (152.4 meters) shall be measured along the interstate or freeway from the beginning or ending of payment widening at the exit from or entrance to the main-traveled way.
3. Nonexpress federal-aid primary highways:
   a. Outside of incorporated cities—no two structures shall be spaced less than three hundred feet (91.44 meters) apart.
   b. Inside of incorporated cities—no two structures shall be spaced less than one hundred feet (30.48 meters) apart.
4. The spacing-between-structures provisions of subsections 2 and 3 do not apply to structures separated by buildings or other obstructions in such a manner that only one sign facing located within the above spacing distances is visible from the highway at any one time.

General Authority
NDCC 24-17-09

Law Implemented
NDCC 24-17-09

36-02-03-03. Penalty. Any sign erected or maintained in violation of this article may be caused to conform to the article as directed by the highway commissioner, and if it is not possible for the sign to conform, then the commissioner may request the owner to remove it and if the owner fails to remove the sign after thirty days' notice, the highway commissioners may cause it to be removed by state forces and the owner billed for the expense.

General Authority
NDCC 24-17-09

Law Implemented
NDCC 24-17-09

APPENDIX F.

NORTH DAKOTA HIGHWAY COMMISSIONER'S FORM LETTERS OF NOTICE TO REMOVE SIGN

Re: Project No:
County:
Notice to Sign Owner
Sign #

Dear Sir:

The sign identified below has been found to have been illegally erected.

Advertising: _____
located in the _____ of Section _____,
Township _____, Range _____,
approximately _____ miles _____
of _____ on Highway No. _____
in _____ County.

Pursuant to the provisions of Section 24-17-11 of the North Dakota Century Code you are hereby notified that unless you remove it within thirty (30) days, it will be deemed abandoned and removed by State forces.

Very truly yours,

Robert K. King
Right of Way Engineer

Re: Sign Project No:

Dear Sign Owner:

Since December 2, 1965 the erection of any signs adjacent to and within a distance of 660 feet of the highway rights of way on any Primary or Interstate Highway in the State of North Dakota has been prohibited without obtaining a permit. This was in accordance with the requirements of the Federal Beautification Act of 1965. However, "On Premise" type signs were exempted from this requirement.

Shortly after December 2, 1965 the Highway Department inventoried all signs along these highways. We are, therefore, able to determine which signs existed at that time and which did not.

Our records indicate that your sign was erected after that date, and does not have a permit, nor does it qualify as an "On Premise". Therefore, we must ask that it be removed by that date stated in the attached letter.

Very truly yours,

Robert E. King
Right of Way Engineer

APPENDIX G.

NOTICE OF APPEAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Newman Signs, Inc., a
North Dakota corporation,

Appellant,

vs. **Civil No. 9394**

Walter R. Hjelle, as North
Dakota State Highway
Commissioner, and North
Dakota Highway Corridor
Board,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Newman Signs, Inc. hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of

North Dakota entered on July 3, 1978, and from the Order of said Court Denying the Petition for Rehearing entered on August 3, 1978, upholding the constitutionality of Chapter 24-17 of the North Dakota Century Code, upholding Section 24-17-11 of the North Dakota Century Code, and upholding the constitutionality of the actions, rules and regulations of Walter R. Hjelle as North Dakota State Highway Commissioner, and upholding the constitutionality of the actions, interim policy, rules and regulations of the North Dakota Highway Corridor Board.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

Edmund G. Vinje II

HJELLUM, WEISS, NERISON,
JUKKALA & VINJE
Suite 200 Jamestown Mall, P.O.
Box 1560
Jamestown, North Dakota 58401
Attorneys for Appellant

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Newman Signs, Inc., a
North Dakota corporation,

Appellant,

vs. **Civil No. 9394**

Walter R. Hjelle, as North
Dakota State Highway
Commissioner, and North
Dakota Highway Corridor
Board,

Appellees.

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF STUTSMAN)

Shirley Sanders, being first duly sworn, deposes and says that, pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States, on the 29th day of September, 1978, she served a copy of the NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the Appellees by depositing same in the United States mail, first class postage prepaid, and addressed to counsel of record, Albert A. Wolf, P.O. Box 773, Bismarck, North Dakota 58501, and Max D. Rosenberg, P.O. Box 1398, Bismarck, North Dakota 58501.

All parties required to be served have been served.
Dated this 29th day of September, 1978.

Shirley Sanders

Subscribed and sworn to before me this 29th day of September, 1978.

Loretta Knauss

Notary Public, Stutsman County, North Dakota
My commission expires: June 9, 1983.

(SEAL)

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 78-883

NEWMAN SIGNS, INC.,
a North Dakota corporation,
Appellant/ Petitioner,

v.

WALTER R. HJELLE, as North Dakota State Highway Commissioner, and the NORTH DAKOTA HIGHWAY CORRIDOR BOARD,
Appellees/ Respondents.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

MOTION TO DISMISS OR AFFIRM

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IN THE

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No. 78-883

NEWMAN SIGNS, INC.,
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v.

WALTER R. HJELLE, as North Dakota State Highway Commissioner, and the NORTH DAKOTA HIGHWAY CORRIDOR BOARD,
Appellees/ Respondents.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of North Dakota on the ground that the questions on which the decision of the cause depends have been decided by the Supreme Court of the State of North Dakota in accordance with the provisions of the United States Constitution and are so unsubstantial as to require no further argument or review by this Court.

I.

THE STATE INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTE

This appeal raises the question of validity of certain provisions of the North Dakota "Highway Beautification Act" (acts of the legislature of North Dakota, 1967, Chapter 24-17, NDCC, as amended, 1969, 1975, 1977), hereafter referred to as the "Act".

This statute provides that no outdoor advertising signs shall be erected or maintained within 660 feet from the nearest edge of the right-of-way and visible from the main traveled way of any highway which is a part of the State Highway System in the state except signs advertising the sale of the property upon which they are located, signs advertising services or activities on the premises upon which the sign is located, or signs which are located in zoned or unzoned commercial or industrial areas. The 1975 and 1977 amendments extended the prohibition beyond the 660 feet if erected with the purpose of their message being read from such main traveled way except signs advertising the sale or lease of the property upon which they are located and signs advertising activities conducted on the premises. The statute further provides that any signs which violate the provisions of the chapter shall be declared illegal by the Commissioner and upon thirty (30) days' notice to the owner thereof shall be deemed abandoned and removable from the premises by the Highway Commissioner.

B. THE PROCEEDINGS BELOW

After January, 1972, when the Highway Commissioner executed an agreement with the Federal Highway Administrator as provided under the terms of Title 23, United States Code, §131, the Federal Highway Beautification Act of 1965, federal participation funds were made available for the removal of signs where just compensation was required to be made under the terms of the statute. The removal program was then commenced and notice was served upon the appellant for removal of certain signs which had been erected or expanded since the effective date of the Act as provided in the Act. Appellant commenced two actions against the Highway Commissioner to restrain such removal without compensation and the Highway Commissioner commenced an action to have certain classification of signs declared illegal and subject to removal without compensation, which actions were consolidated for trial. The trial court entered its judgment upholding the validity of the North Dakota Highway Beautification Act, but finding that its effective date was January 19, 1972, rather than January 1, 1968 as provided in the Act. The North Dakota Supreme Court entered its decision upholding the validity of the North Dakota statute and finding its effective date to be January 1, 1968 as provided in the statute.

II.

ARGUMENT

The case presents no substantial federal question.

(a) *Appellant contends that the statute violates First*

Amendment Freedom of Speech rights. The appellant relies primarily on the case of *Landmark Communications, Inc. v. Virginia,* ___ U.S. ___, 56 L.Ed.2d 1, 98 S.Ct. 59, in support of its freedom of speech argument. The *Landmark* case arose from an attempt by the State of Virginia to protect the good reputation of its judges and courts by punishing or repressing freedom of speech. The court held that although the government may punish the theft of privileged documents or deny access to such information, it cannot punish the publication once the information falls into the hands of the press who are non-participants in the proceedings which provide the information. In stating its opinion in the *Landmark* case, this court reiterated its previously established rules that First Amendment protection primarily extends to a free discussion of governmental affairs and the performance of public officials including judges. To have allowed Virginia to suppress the public discussion described in the *Landmark* case would have truly violated the First Amendment guarantees of freedom of speech. The decision, however, is not applicable to this case where the North Dakota statute merely controls the locations at which commercial expressions may be carried rather than controlling or suppressing the content of the message contained therein. The Supreme Court of North Dakota in the decision in question emphasized the important distinction between regulations aimed at message content on the one hand and time, place and manner of restrictions on the other, and found that the North Dakota Highway Beautification Act "does not purport to regulate speech on the basis of its content or completely prevent the dissemination of the same

information by alternative means. Rather, the statute merely provides restrictions on the place and manner of erection of the outdoor advertising signs."

The appellant cites the case of *Virginia State Board of Pharmacy et al. v. Virginia Citizens Consumer Council, Inc., et al,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 2d 346 (1976). This case recognizes the distinction made by the North Dakota Supreme Court finding that to constitute a legitimate time, place, or manner of restriction, the regulation must satisfy three criteria:

(1) The restriction on speech must be justified without reference to the content of the regulated speech;

(2) The restriction must serve a significant governmental interest; and

(3) In so doing, the restriction must leave open ample alternative channels for communication of the information. In *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977), cited by appellant, this court went to great lengths to demonstrate that the statute involved in that case prohibited signs containing a particular content, that is, the "for sale" signs located on front lawns. The court recognizes that although the proscription applies only to one mode of communication, it does not transform into a time, place, or manner case.

In order to clearly distinguish the citations referred to by appellant, one must distinguish, as the courts have generally done, between the statutes or regulations involving a content control on the one hand or a time, place, and manner restriction on the other. The Maine Federal District Court clearly applied the distinction in the case of *John Donnelly & Sons, et al v. Mallar,* 453 F. Supp. 1272 (D.C. Maine 1978), in

evaluating the Maine Travelers Information Service Act, an act substantially the same as the North Dakota Highway Beautification Act. In citing *Elrod v. Burns,* 427 U.S. 347 (1976) and *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d 600, (1975), the appellant has clearly demonstrated that it relies upon the "content" message restrictions authorities rather than the "time, place, and manner restrictions" authorities. *Elrod v. Burns,* supra, involved a dismissal of a municipal employee on the basis of political affiliation while *Bigelow v. Virginia,* supra, struck down a prohibition advertising abortion, clearly a content restriction. In addition to *John Donnelly & Sons v. Mallar,* supra, other courts have upheld the First Amendment constitutionality of billboard regulations as a valid time, place and manner restriction. *Markham Advertising Company v. State,* 439 P.2d 248 (Wash. 1968) app. dismissed, 393 U.S. 316; *John Donnelly & Sons v. Outdoor Advertising Board, et al,* 339 NE 2d 709 (Mass. 1975), *Ghaster Properties, Inc. v. Preston,* 200 NE 2d 328 (Ohio 1964).

The appellant has cited the case of *In re Primus,* 56 L.Ed. 2d 417 (1978) and *Ohralik v. Ohio State Bar Association,* 56 L.Ed. 2d 444, both cases having to do with state regulations of solicitation by members of the legal profession. This court distinguishes between legitimate truthful advertising for routine legal services and in-person solicitation of clients at hospitals and accident scenes. The exacting distinctions established by these two cases are important in determining the proper limitations on First Amendment rights of freedom of speech. The court also drew the distinctions between commercial and political speech, suggesting that the court has afforded commercial speech a limited

measure of protection commensurate with its subordinate position in the scale of First Amendment values while allowing modes of regulation that might be impermissible in the realm of non-commercial expression. The Arizona court in *Planned Parenthood Committee v. Maricopa County,* 375 P.2d 719 (1962) summarized at page 727 the various kinds of regulations that are generally accepted by the courts:

> "The limited area of speech activity, advertising, which is here regulated, is one which is subject to regulation in many contexts by both state and federal governments. The manner in which many commodities are advertised is closely supervised by the Federal Trade Commission. Advertisements for the sale of securities are highly regulated. The advertising of goods at less than cost is prohibited in some jurisdictions. . . ."

This court in *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) approved the prohibition of the use of sound trucks on the same grounds as other courts have validated billboard advertising statutes against First Amendment challenges. This court in *Packer Corporation v. Utah,* 285, U.S. 105, 52 S.Ct. 273, 76 L.Ed. 643 (1932), recognized the intrusive nature of billboards, streetcar signs and placards which are constantly before the eyes of the observers on the streets to be seen without the exercise of choice or volition on their part, while other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. This line of thinking was also relied upon in *General Outdoor Advertising v. Department of Public Works,* 298 Massachusetts 149, 193 NE 799 (1935) and in *Markham Adv. Co. v. State,* supra.

The North Dakota Supreme Court in this decision

recognized, as have other states, that the Beautification Act addressed itself to a legitimate public purpose. The preamble to the Act explains the purpose of the enactment as follows:

> "Declaring public policy with regard to the regulation of outdoor advertising and the restoration, preservation and enhancement of scenic beauty;"

The declaration of policy as contained in Section 24-17-1, NDCC:

> ". . . in the public interest reasonably to regulate advertising devices along the highways hereinafter specified while, at the same time recognizing that both the convenience of travel and the interests of the economy as a whole require reasonable freedom to advertise. . . ."

Section 24-17-09, NDCC, prescribes the duties of the Highway Corridor Board established by the Act:

> "1. For the purpose of promoting the public health, safety, welfare, convenience, enjoyment and recreational value of the public highways, to protect the public investment in the state highway system and to preserve the natural beauty of lands bordering on the state highway system, . . ."

Because of its intrusive quality and its commercial nature, regulation of billboard advertising is entitled to a lesser degree of constitutional scrutiny as long as it meets the "time, place, and manner restriction" on free speech. There is no indication in the North Dakota Highway Beautification Act that any particular content of the messages are regulated by the Act. The placement restrictions of the Act, however, serve well defined governmental and public interests as enunciated by the statute itself. This court in *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) gives the basis for evaluating regulations within the concept of public welfare:

> "The concept of the public welfare is broad and inclusive . . . the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."

The North Dakota decision also recognizes safety as a purpose of the Act and expresses agreement with the statement of the New York Appellate Court in *Whitmier & Ferris Company v. State,* 230 NE 2d 904 (1967), which recognized that legislatures could determine that the safety of the travelling public is endangered by the distraction of the attention of drivers of automobiles viewing advertising signs and can properly exercise the police power to control the location of those signs.

The North Dakota Highway Beautification Act is a reasonable "time, place and manner restriction" upon commercial advertising and does not deprive the appellant of any First Amendment freedom of speech rights. The test is indeed "reasonableness" of the control as weighed against the public benefits derived therefrom. *Markham Advertising Company v. State,* supra, suggested that there is no blanket requirement that the legislature must subordinate all other legitimate public interest to the protection of free speech, nor should the enforcement of the freedom of speech be in disregard of the rights of others as stated in *Kovacs v. Cooper,* supra.

(b) *Appellant contends that there is a deprivation of*

due process arising out of a lack of notice and hearing provisions of the Act. Section 24-17-11, NDCC, provides for the Commissioner to give thirty (30) days' notice to the owner of the sign, to remove the same if it is a prohibited sign or to cause it to conform to regulations if it is an unauthorized sign. Section 24-17-15, NDCC, sets forth the procedure to be followed by a person aggrieved by a decision that a sign is illegal giving a right to appeal pursuant to Section 28-32, NDCC. The 30-day notice allows a sign owner to request a hearing to appeal the decision, or seek injunctive relief as the appellant did in this case, all before the appellant's signs are removed by the Commissioner. Certainly this procedure meets the constitutional requirement of procedural due process. It was the North Dakota legislature that determined that certain signs would be illegal and subject to removal. The challenge to the constitutionality of the Act itself or the administrative decisions of the Highway Corridor Board or the Highway Commission would have been more properly brought shortly after the enactment. This issue will be discussed later.

Appellant's position on this point suggests that the Commissioner was required to hold a hearing and allow the sign owner to challenge the constitutionality of the Act or the wisdom of the legislation, before the removal of each sign. It was the legislature that deemed the removal of certain signs necessary in the State of North Dakota, and the appellant and other sign owners had their opportunity to be heard before the legislative body. The statute gave a 30-day notice to the sign owners to give opportunity to make known any circumstances or variances which would make the Act inapplicable to any particular sign. The appellant was

effectively protected by that procedure and effectively prevented the removal of signs by seeking judicial review during the 30-day notice period.

Appellant cites the case of *Memphis Light, Gas and Water Division v. Craft,* 56 L.Ed. 2d 30 (1978) in support of the notice requirement to fulfill the due process requirements. The case involved a municipal utility terminating customer service at will. The utility, a monopoly, was held by the court to have a right to terminate customer service only for cause. Apparently, the utility had no provision for notice of intention to terminate customer service comparable to the 30-day notice required by the North Dakota Highway Beautification Act before removal of signs. In *Mathews v. Eldridge,* 424 U.S. 319 (1976), cited by appellant, this court held that there was no deprivation of procedural due process where no evidentiary hearing was required prior to the termination of social security disability payments. In citing the case of *Morrisey v. Crewer,* 408 U.S. 471 (1972), the court in the *Mathews* case restated that "due process is flexible and calls for such procedural protections as a particular situation demands." The court goes on to suggest that resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.

(c) *Appellant contends that the Act deprives him of due process and equal protection in that it discriminates against certain outdoor advertising signs and denies appellant the right to do business.* Appellant cites the case of *Nectow v. City of Cambridge,* 277 U.S. 183 73 L.Ed. 184, in support of the contention that there has been a deprivation of the right to carry on an

occupation. In this case, the court found that the municipal zoning would not promote the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected, and therefore provided no basis to the city for denying the landowner a permit to erect certain buildings.

As part of the argument of discrimination against a class of signs as being prohibited by the equal protection clause of the Fourteenth Amendment, the appellant cites the case of *Dandridge v. Williams,* 397 U.S. 471 (1970) reh. den. 398 U.S. 914 where a three-judge 471 (1970) reh. den. 398 U.S. 914 where a three-Judge District Court panel held a Maryland regulation was violative of the equal protection clause. The court found "overreaching" because the regulation results in some disparity in grants of welfare payments to the larger families. The case came to this court after the regulation had been declared in violation of the constitution. The appellant cited *In re Griffiths,* 413 U.S. 717 (1973) where this court struck down the State Bar Association prohibition against admission of alien lawyers to the Connecticut Bar. The court held that when the state adopts a suspect classification, it bears a heavy burden of justifying the classification by showing that its purpose or interest is both constitutionally permissible and substantial and that its use of the classification is necessary to the accomplishment of its purpose for the safeguarding of its interest. The court found, of course, that the state has other means of supervising the conduct of alien legal practitioners which would not necessitate the total elimination of such persons from the practice of law within the state. The North Dakota statute adopted a reasonable criteria for limitation of signs as distinguished from the

"alien lawyer" prohibition in Connecticut.

Appellant relies on *Grayned v. City of Rockford,* 408 U.S. 104 (1972) wherein this court struck down an ordinance controlling certain types of picketing. The court easily found the equal protection clause violated in that the city attempted to control certain types of picketing while allowing other types of picketing based on the message conveyed by the expressive conduct of such picketing, thereby determining disorderly conduct by the subject matter of the position conveyed by the picketers. Not only did the court find the lack of equal protection in this case, but also a violation of freedom of expression as the ordinance was based on the content.

The North Dakota statute in question does not attempt to control the "content" of the billboards as previously discussed, the statute is not repugnant to the federal constitution. Although it may affect various types of signs carrying all conceivable kinds of messages, it does not prohibit such signs based on the message contained therein, but rather on the location of the sign in respect to the traveling public, and with reference to the various communities of the state located along the highway system. Allowing certain on-premises signs, directional signs, and signs located in areas which are in the proximity of byways near the cities of the state, constitutes a reasonable distinction from signs that might otherwise be located away from the business or activities it advertises and that would be distracting from the otherwise unencumbered countryside and scenic view of the traveling public.

The exercise of police powers is the most important of governmental powers, as it affects the very existence of government as well as the security of the social order,

the life and health of the citizen, the enjoyment of private and social life and the beneficial use of property. 16 AmJur 2d Constitutional Law, §263, p. 517, 518. In *State v. Dolan,* 92 P. 995, the court properly defined police power as ". . . that power in government which restrains individuals from transgressing the rights of others, and restrains them in their conduct so far as is necessary to protect the rights of all." The distinction between exercise of police powers and the exercise of eminent domain often provides some further definition of police powers. Under police powers, many restrictions may be imposed without compensation being given, whereas under the power of eminent domain compensation is required. This distinction lies partly in the fact that in eminent domain, property or a right in property is taken from the owner and transferred to a public agency to be enjoyed by it as its own, whereas under the police power, although it may, and often does, take property in the constitutional sense so that it must be paid for, this is not accomplished by a transfer of ownership, but by destroying the property or impairing its value. Private property is taken by eminent domain for a public use, while the police power regulates its use and enjoyment, or, if it takes or damages it, it is not a taking or damaging for the public purpose, but to conserve the safety, morals, health, and general welfare of the public. 16 AmJur 2d Constitutional Law, §264, p. 518. Justice Holmes states that in a general way, the police power extends to all the great public needs and may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. *Day-Brite Lighting, Inc. v. Missouri,*

342 U.S. 421, 92 L.Ed. 469, 72 S.Ct. 405, reh. den. 343 U.S. 921, 96 L.Ed. 1334, 72 S.Ct. 674.

In the case of *City of Eastlake v. Forest City Enterprise, Inc.,* US 49 L.Ed. 2d 132, 96 S.Ct. 2358, 178, this court upheld a city charter provision requiring land use changes to be proved by 55% of the voters, thereby reversing the Ohio Supreme Court which had held that the lack of standards to guide the decision of the voters was an arbitrary and capricious use of police power. This court took the view that a referendum is not a delegation of power since all powers arise from the people who can delegate it to the representative instrumentalities which they create. This court distinguished *Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926) which had allowed a property owner to challenge a zoning restriction which was "clearly arbitrary and unreasonable", and on the further basis that *Eastlake* represented a referendum action of the community at large while *Euclid* represented a delegation to a narrow segment of the community. It should be noted that appellant in this case attacks the statute which was passed by the legislature of the State of North Dakota where the power to enact has not been delegated to a narrow segment of the community as in the *Euclid* case.

In the case of *Bridgeport Hydraulic Company v. Council of Water, etc.,* F. Supp. 942 (1977), a three-Judge District Court in Connecticut upheld a statute imposing a moratorium on the sale of water company lands as a permissible exercise of police power and not an arbitrary interference with private rights. This court in *Williamson v. Lee Optical,* 348 U.S. 483 held that it is enough to sustain the statute that there is an evil at hand for correction and that it might be thought that

the particular legislative measure was a rational way to correct it. Certainly the legislative intent of the North Dakota legislature as previously referred to in this brief, suggests a rational attempt at accomplishing a public need or interest. In *North Dakota Pharmacy Board v. Snyder's Stores,* 414 U.S. 156, 38 L.Ed. 2d 379, 94 S.Ct. 407 (1973), this court or certiorari, reversed the North Dakota Supreme Court and remanded for further proceedings thereby upholding a statutory stock ownership requirement by a registered pharmacist before a permit is issued to a corporation for operation of a pharmacy in the State of North Dakota. In so doing, the court overruled its holding in *Liggett Co. v. Baldridge,* 278 U.S. 105, 73 L.Ed. 204, 49 S.Ct. 57. This court had announced in *Daniel v. Family Security Life Insurance Company,* 336 U.S. 220, 93 L.Ed. 632, 69 S.Ct. 550, 10 ALR 2d 945, "A pronounced shift of emphasis since the *Liggett* case". In the *Snyder* case, supra, this court impliedly acknowledged the proper exercise of police powers for the protection of the public in upholding the stock ownership requirement provisions of the North Dakota act. In view of that line of cases, it would appear that the clearly proper exercise of the police powers of the State of North Dakota in adopting the Highway Beautification Act was based upon a demonstrated public need and interest as previously discussed, removing it from any consideration by this court as to its repugnancy to any federal statute or constitutional provision.

(d) *Appellant contends that there is a deprivation of due process by taking property without just compensation.* Admittedly, the courts have held that the form of regulation can be so onerous as to constitute a taking which constitutionally requires compensation as in the

case of *Goldblatt v. Hempstad,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962). It has also been generally held that a reasonable restriction on the use of property pursuant to a state's police power does not constitute a taking of private property for public use requiring payment of just compensation so long as the regulation is reasonably related to a proper purpose and does not unreasonably deprive the property owner of all or substantially all beneficial use of this property. *Modjeska Signs Studios, Inc. v. Berle,* 43 N.Y. 2d 468, 373 NE 2d 255 (C.A.N.Y. 1977), app. dismissed 439 U.S. (October 2, 1978); *Suffolk Outdoor Advertising Company v. Hulse,* 43 N.Y. 2d 483, 402 N.Y.S. 2d 368, 373 NE 2d 263 (1977), app. dismissed; 439 U.S. (October 2, 1978). The question is whether the North Dakota Act is reasonably related to a proper purpose under the state's police power. The appellant has contended that the North Dakota legislature acted unreasonably, arbitrarily and without proper purpose. Appellant contends that the Act was passed in North Dakota only to comply with the federal law and thereby discounts the language contained in the preamble to the Act and in the declaration of policy, heretofore set forth in this brief. The North Dakota court concluded that the purposes set forth in the Act were within the proper scope of the police power of the state, and cited as authority for that conclusion the case of *Markham,* supra; *Inhabitants, Town of Boosebay v. National Advertising Company,* 347 At. 2d 419 (1975); *Cromwell v. Ferrier,* 19 N.Y. 2d 263, 225 N.E.2d 749 (1967).

The Act does compensate for removal of lawfully erected signs which due to the enactment of the statute become nonconforming. The court found that the Act

became effective January 1, 1968 and cited the case decided by the Court of Appeals of Louisiana, State, *Department of Highways v. Lamar Advertising Company of Louisiana, Inc.*, 304 S. 2d 779 (1974). Therefore, all signs erected or substantially expanded after January 1, 1968, were deemed illegal and subject to removal without compensation. The North Dakota Court also concluded that the Act did not deprive the appellant of all or substantially all of the beneficial use of its property. In so doing, the court recognized that there are substantial numbers of locations for maintenance of outdoor advertising signs available to the appellant for relocation of signs in conforming areas. Secondly, the law allows signs that were erected before or after the effective date of the Act in conforming areas to remain undisturbed. Most of those sign structures display changeable copy which allows for considerable latitude by an outdoor advertiser in continuing his business and providing advertising services to his customers. This regulation may incur some costs to the sign owner for relocation of sign structures now located in non-conforming areas, but the relocation of sign structures is an on-going project in keeping with the development of the State Highway system. This court has held that the mere fact that the regulation deprives the property owner of the most profitable use of this property is not necessarily enough to establish the owner's right to compensation. *United States v. Central Eureka Mining Company*, 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed. 2d 1228 (1958). This form of regulation is not so onerous as to constitute a taking which constitutionally requires compensation as suggested by this court in *Goldblatt*, supra, since only sign structures erected after the effective date of the Act are

subject to removal without compensation. In the meantime, those structures have generated revenue for the sign owner and are available for relocation to conforming areas along the State Highway system.

(e) *Appellees contend that waiver and estoppel prevents appellant from attacking the constitutionality of the Act.* The North Dakota legislature passed the Act in 1967 designating January 1, 1968 as the effective date. The Commissioner adopted a permit program pursuant to the Act and appellant obtained permits and erected signs pursuant to the permit program after the effective date of the Act and through the period of time that the litigation occurred. The constitutionality of the Act was first attacked several years after its effective date and only at the time when its enforcement was applied to signs erected or substantially expanded by the appellant after the effective date of the Act.

The authorities have generally held that constitutional provisions can be waived by individuals. 16 AmJur 2d Constitutional Law, §131-136 provides a reliable discussion of the legal authorities supporting this principle. Section 131 thereof provides as follows:

> "With certain exceptions an individual may waive constitutional provisions intended for his benefit, especially where no question of public policy or public morals is involved. Such waiver may be in writing or by conduct amounting to an estoppel; it must be voluntary. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.
>
> "It seems that constitutional provisions intended to protect property may in all instances be waived. Even some of the constitutional rights intended to

> secure personal liberty are subjects of waiver. Indeed, it has been said that the doctrine of waiver is applicable to all rights or privileges to which a person is legally entitled by constitutional guaranty, provided that such rights and privileges rest in the individual and are intended for his sole benefit.
>
> "It has been broadly stated that in civil actions, privileges which rise to the dignity of constitutional or statutory rights may be waived."

In Section 133 thereof is found the well recognized rule in constitutional law that estoppel may operate to prevent a party from asserting that an act is unconstitutional, unless the proceeding under the act or what is thought to be accomplished is per se illegal. The example cited is the estoppel which results where rights are secured on conditions preventing the questioning of a law. That authority cites this court's decision in *International & G.N.R. Co. v. Anderson County,* 246 U.S. 424, 62 L.Ed. 807, 38 S.Ct. 370. Section 135 thereof refers to the rule that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens, and cites this court's decision in *United Fuel Gas Co. v. Kentucky R. Com.,* 278 U.S. 300, 73 L.Ed. 390, 49 S.Ct. 150, and a long line of decisions from this court and other courts. The right to raise a constitutional question may also be waived by failing to take an appeal promptly, as established by this court's decision in *Andrews v. Swartz,* 156 U.S. 272, 39 L.Ed. 422, 15 S.Ct. 389. In this case, the appellant continued to maintain and erect outdoor advertising signs pursuant to the procedures set up under the act and acquired additional signs from

other advertising companies who terminated or diminished their activities under the provisions of the Act. The appellant should not be allowed to now attack the constitutionality of the Act which has provided to him the benefits of continuing his business under the permit program for over ten years, and deriving therefrom the revenue generated by the existing signs.

CONCLUSION

The decision of the North Dakota Supreme Court does not present a substantial federal question for this court to review and the appeal should be dismissed or affirmed by this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-883

NEWMAN SIGNS, INC.,
A North Dakota corporation,
Appellant/Petitioner,

v.

WALTER R. HJELLE, as North Dakota State Highway Commissioner,
and the NORTH DAKOTA HIGHWAY CORRIDOR BOARD,
Appellees/Respondents.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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I.

INTRODUCTION

The Motion to Dismiss fails to show that the questions presented herein are not substantial and deserving of the plenary consideration of this Court. Appellees in their Motion fail to appreciate the First Amendment interests in

this case, and they fail, as the North Dakota court failed, to apply this Court's precedents and principles when such fundamental rights are involved.

Just as the North Dakota Supreme Court has ignored the vagueness and overbreadth arguments of Appellant, Appellees ignore those arguments. Appellees treat the fundamental right of free speech with little regard following the thinking of the North Dakota Court which said that Appellant's interests are "minimal". (Jur.St. 44a)

Appellant has shown in the Jurisdictional Statement that this case involves more than just commercial speech as defined by this Court. Although Appellees attempt to relegate the case to one of commercial speech alone, and then only to billboards, even their Motion to Dismiss admits that the North Dakota law "affects various types of signs carrying all conceivable kinds of messages". (Motion p. 13) Therefore, this case involves pure speech covering all signs, even those of an individual espousing ideological ideas whose signs are within 660 feet of the nearest edge of the right-of-way and visible from the main traveled way of the state highway system or whose signs are erected beyond 660 feet of the right-of-way but with the purpose of being read from such highway. Those signs fall within the scope of the law whether or not they are in municipalities.

Should this Court not take jurisdiction herein, the law will be left in confusion. Although the sign cases to which this Court has denied plenary consideration may be distinguished on their facts, the status of the law is not clear.

In addition to its other failings, Appellees' motion does not even discuss some of the questions and issues presented in the Jurisdictional Statement. Appellant briefly takes up the following issues which are raised by the Motion in the inverse order as found in the Motion.

II.

WAIVER AND ESTOPPEL ISSUES

If waiver and estoppel are to be considered as issues, then federal standards apply and the facts are controlling. The cases cited in the Motion are not in point. The Appellant could find no case in which the rules of law referred to by the Appellees were applied when fundamental rights are at stake. The facts in this case do not work an estoppel.

In addition to the findings of protest and duress by the North Dakota Supreme Court referred to in the Jurisdictional Statement (see Jur.St. pp. 40. 41, 8a) the trial court found that there was consistent and vigorous hostility to the permit systems, that there was no consent or agreement to the language of the permits, and that the Appellant's choice was to build under the permits or not to build at all. (see Jur. St. 6c, F.O.F. 11) In spite of the fact that the North Dakota Rules of Civil Procedure, Rule 52(a) adopts the federal "clearly erroneous" rule, the North Dakota Supreme Court ignored these findings, did not find the trial court clearly erroneous, and invoked estoppel against the Appellant. However, the North Dakota court did not apply federal standards, nor did it take into consideration that this is a case of encroachment upon fundamental rights.

The trial court, in its conclusions of law, found no estoppel, found an involuntary waiver, and found the attempted regulation by the Commissioner and the Board without effect. Although Appellant implored the North Dakota court to inquire into the authority of the Commissioner to exercise administrative fiat in the attempt to control signs, it ignored the question. The North Dakota court did find, however, that no rules and regulations were

adopted by the Board until August 1, 1973. (see Jur.St. 22a) It also concluded that all signs erected by Appellant under the permit systems prior to August 1, 1973 were lawfully erected.

Although Harold Newman, president of the appellant corporation, was a member of the Highway Corridor Board, he was such a member because the North Dakota law required that a representative of the North Dakota Outdoor Advertising industry be on the Board. (See N.D.C.C. 24-17-06, Jur.St. 15e) It is obvious from the membership of this five-member Board that the member representing the Outdoor Advertising Association was to represent vested interests. As a member of the Board the minutes show Newman immediately protested the adoption of the interim policy proposed by the Board (see Exhibit CB-1, p.6, R.162), and, when the Board was considering acting in response to what were only proposed federal guidelines in 1967, Newman stated that there were no standards and that the Board, which represented the state, did not have to accept those as standards. (See Exhibit CB-1, p.18, R.162)

In addition to the foregoing, the trial court found that confusion, uncertainty, frustration, and ambiguity with respect to the state Act and federal Highway Beautification Act continued to exist from 1967 to 1972. (R. 36, 57, 65, 773, 774, 775, 803, 826, 828, Jur.St. 5c, F.O.F. 7)

The Motion is incorrect in stating that the Commissioner's permit program was adopted pursuant to the "Act" because the Commissioner's efforts to control the conduct of Appellant, and others similarly situated, took place from December of 1965 up to the date on which the North Dakota act was passed in 1967. (Motion, p. 19, Jur.St. App. E.3.a., E.3.b.) As previously shown in the Jurisdictional Statement and herein, the Commissioner's action was blatant and arbitrary disregard of fundamental rights.

This case is not one of election of remedies, nor is it a licensing case in which a business is licensed. There are certain signs for which permits were granted, but there are others which were erected without permits. Each permit was for an individual sign, not for a business.

In *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967) this Court reiterates the standard that waivers of such valued freedoms as freedom of speech will not be sustained "in circumstances which fall short of being clear and compelling". Since it is always in the interest of one who is under duress to choose the lesser of two evils, a choice made according to interest does not exclude duress. *Union Pacific R. Co. v. Public Service Commission,* 248 U.S. 67, 70 (1918) and see *Abie State Bank v. Bryan,* 282 U.S. 765, 775, 776 (1931).

Appellant openly protested and opposed the so-called regulations, so there was no deception and there can be no estoppel when such protests to invalidity of the law are made. *Los Angeles v. Los Angeles City Water Co.,* 177 U.S. 558, 578, 579 (1900).

There are other reasons, too, why waiver and estoppel should not be invoked here:

1. Appellant has argued overbreadth, and even if this Court should consider Appellant to have waived its right to assert the constitutional questions herein, this case raises important questions which should be considered by this Court to resolve the chilling effect which the North Dakota law has on freedom of expression.

2. The North Dakota court applied estoppel to Appellant only against its attack on the Commissioner's regulation and the Board's interim policy. The North Dakota court proceeded to consider the constitutionality of the North Dakota

statutes because it could not find estoppel as to those questions. Therefore, the constitutional questions were reached below and should be considered by this Court.

3. This case involves various categories of signs including signs erected prior to October 22, 1965 which have been expanded and never have been the subject of any regulations, and including signs which were erected after January 1, 1968 for which no permits were sought. Therefore, the questions of the constitutionality of the actions of the Commissioner and the Board are raised by those facts unrelated to any question of whether application for and issuance of permits constitute estoppel.

Irrespective of the above, the estoppel which Appellees assert should be invoked necessitates a benefit to be derived by the Appellant. However, Appellant had the right to be in business prior to the actions of the Commissioner and the Board. That right was coupled with the fundamental right of freedom of speech. The actions of the Commissioner and of the Board could not grant Appellant any further benefit than that which the First Amendment had already insured. Therefore, the attempts at regulation could be nothing more than limitations on Appellant's, and others', fundamental rights. A limitation is not a benefit.

III.

PROCEDURAL DUE PROCESS ISSUES

Lest the Motion mislead this Court, the hearing which the Motion states a sign owner is allowed under N.D.C.C. 24-17-15 is not an administrative hearing but rather only the right to seek judicial review by injunction and judicial

process, a cumbersome and expensive procedure at best. (See Motion, p. 10) The questions raised under the procedural due process question of the Jurisdictional Statement are substantial, and the unconstitutional procedures will continue in use by the administrators of the North Dakota Act if unchecked by this Court.

IV.

FIRST AMENDMENT ISSUES

Standing alone, without qualification, the broad standards set forth in *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 at 771 (1976) lend themselves nicely to application sustaining vague and overbroad regulations. If it is only necessary not to refer to content, and to state one of the several legitimate purposes which sustains all police power legislation (health, welfare, safety, morals or aesthetics), and to be able to say that the expression may be expressed by some alternate available means, then it would be easy to draft language which would always accomplish the ends sought without constitutionally jeopardizing the means utilized. This is the approach which the North Dakota court has taken and Appellees desire this Court to sustain. However, this Court in *Virginia Pharmacy Board,* supra, did not find it necessary to inquire into the bounds of time, place and manner restrictions and it did qualify the standards set forth by reference to a long line of cases.

Although the North Dakota court made reference to some of those cases, it did so as justification for its opinion, without examination of the application of the principles recited therein to this case, and in an obvious attempt to justify the North Dakota law and state action.

Appellant now briefly takes up, in inverse order, the three-fold criteria relied upon by Appellees in their Motion as stated in *Virginia Pharmacy Board,* supra.

1. *Alternate Channels.* The North Dakota law makes no provision for alternate channels of communication. There is no exception for political, social or any kind of ideological sign. Even in the very restricted areas in which off-premise signs are allowed, the spacing regulations are strict and the cumbersome permit process must be followed. (See App. 44e, 38e, 39e)

It is difficult to understand how a person interested in communicating with the traveling public, whether the communication is commercial or non-commercial, will be able to accomplish that end. This is particularly true in rural areas such as North Dakota. (North Dakota has only one standard metropolitan statistical area.) Certainly television, radio, leaflets, pamphlets or newspapers are not readily, if ever, available for communication with the traveling public on the public thoroughfare. Appellant invites this Court to use its imagination, transporting itself to rural North Dakota, traveling through or between places therein, and looking for information. And, inversely, imagine an individual in North Dakota attempting to communicate, perhaps an ideological idea, to the same traveler.

Appellees rely on *John Donnelly & Sons v. Mallar,* 453 F. Supp. 1272 (D.C.Me. 1978). However, that case is easily distinguishable from the instant case because the legislature there made more specific findings (ibid. 1275, 1276), it provided for official business directional signs (ibid. 1276) and it specifically allowed non-commercial messages conveyed by political, civic and charitable signs (ibid. 1280). Thus, the question of the regulation of signs of private

individuals conveying ideological messages was not at issue there, and alternate means were provided within the Maine statute itself.

2. *Significant Governmental Interest.* Appellees have not provided the Court with any reference to any evidence supporting the governmental interests set forth in the North Dakota Act. There is no such evidence in the record and there are no such findings.

The various purposes as set out in the North Dakota law are reinterated at page 8 of the Motion. In addition to the language Appellees quote, however, N.D.C.C. 24-17-01 states "that both the convenience of travel and the interests of the economy as a whole require a reasonable freedom to advertise", and that "(I)t is the intention of the legislative assembly in this chapter to provide a statutory basis for the regulation, but not the prohibition, of outdoor advertising".

Thus, the North Dakota legislation was purely enabling legislation, and regulations were necessary to implement that enabling legislation. The date Chapter 24-17 of the North Dakota Century Code became law is not so significant as the date that the law was implemented. That date, by decision of the North Dakota court, was not until the rules and regulations were adopted by the Highway Corridor Board on August 1, 1973.

Therefore, it is significant that N.D.C.C. 24-17-09 couples with the purposes set forth in subsection 1 thereof and quoted by Appellees, the mandate that the Board "shall enact suitable regulations to carry out the purposes of this chapter." The Board did not have regulations until August 1, 1973; it has never established any zoning district; and it has never adopted a comprehensive plan and design. N.D.C.C. 24-17-09, App. 16e, 17e, 18e. The agreement referred to in N.D.C.C. 24-17-09 (2)(f) was not entered into until January 19, 1972.

Appellant does not concede that the North Dakota law is now constitutionally sound, but for the sake of argument, it has consistently contended alternatively that there could not possibly have been constitutional regulation prior to August 1, 1973 and that all signs erected prior to that date were lawfully erected.

The North Dakota law cannot sustain the attack under the questions presented to this Court. The case of *Kovacs v. Cooper,* 336 U.S. 77 (1949) cited by Appellees supports Appellant's position. The case is an example of closely drawn legislation furthering a subordinating interest which is compelling. Not all sound trucks were prohibited, but only those reaching a certain decibel limitation.

To affirm the decision in this case, or to dismiss this appeal, will create a conflict between this case and that of *Baldwin v. Redwood City,* 540 F.2d 1360 (9th Cir. 1976), *cert. denied,* 431 U.S. 913 (1977) where the Court said at page 1366 that signs are "virtually pure speech". The instant case is no less a regulation of political speech than the Redwood City Ordinance. That case illustrates not only the burden on freedom of speech that such regulation interposes, but also suggests the degree of narrowly drawn specificity such regulation can and should have.

3. *Regulation of Content.* The terms "off-premise" and "on-premise" are misleading. They would appear to relate to location, but they really relate to content. It is the content of the sign, not its location, which places it within one category or the other. Two signs can be located in the same location, they can be of the same size and type, and they can be intended to convey their message to the same recipients. However, one, because its content conveys a message with respect to the property upon which it is located, is an on-

premise sign, while the other, because it contains content which conveys a message not related to the property upon which it is located, is off-premise. The key to the distinction is content. Regulation based on that distinction is therefore justified by reference to content. Thus the North Dakota Act fails this test. (See N.D.C.C. 24-17-03 and 24-17-03.1, Jur.St. 11e, 12e, 13e)

Query: If this appeal is dismissed, or the decision is affirmed, can the leaflet, pamphlet, armband, picket, or loudspeaker, in the name of a "legitimate" state interest unsupported by the record or findings, because other channels are available, be regulated by generally allowing them only if their content relates to the location of their use, but be prohibited or strictly limited from access to the public thoroughfare if their content does not relate to the location of their use?

V.

CONCLUSION

For the reasons set forth in the Jurisdictional Statement and in this Brief, the motion should be denied, probable jurisdiction should be noted, or in the alternative certiorari granted, and the case should be set for consideration on its merits.

Respectfully submitted,

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